Jan 28 1870.

Submitted

Jas. Clifford

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~107.~~ 252

THE CITY OF CHICAGO, APPELLANT,

vs.

WILLIAM C. SHELDON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Abstract

FILED SEPTEMBER 14, 1869.

Post Mark

Jas Nelson

SUPREME COURT OF THE UNITED STATES.

No. 487.

THE CITY OF CHICAGO, APPELLANT,

vs.

WILLIAM C. SHELDON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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3 Pleas in the circuit court of the United States for the northern district of Illinois, sitting in chancery at the United States court-room in the city of Chicago, in the district aforesaid, before the Hon. David Davis, one of the justices of the Supreme Court of the United States, presiding, and the Hon. Thomas Drummond, district judge of said district, associate judges of said circuit court, on Thursday, the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-third year.

WILLIAM H. BRADLEY, *Clerk.*

WILLIAM C. SHELDON
vs.
THE CITY OF CHICAGO—A. H. HEALD, John R. Turner, Volentine C. Turner, George F. Rumsey, and Jacob Rehm. } Chancery.

4 NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twentieth day of January, in the year of our Lord one thousand eight hundred and sixty-nine, came William C. Sheldon, complainant, by Messrs. Goudy and Chandler, his solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his bill of complaint against the city of Chicago, A. H. Heald, John R. Turner, Voluntine C. Turner, George F. Rumsey, and Jacob Rehm, defendants; and also, at the same time, filed his bond for costs in the said entitled cause; which said bond and bill are respectively in the words and figures following, to wit:

United States of America, northern district of Illinois.—December term, 1868.

WILLIAM C. SHELDON
vs.
THE CITY OF CHICAGO *et al.* } In chancery.

We enter ourselves security for costs in this cause, and promise
5 to pay all costs which may accrue to the opposite party in this action, or to any officers in this court; and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 20th day of January, A. D. 1869.

GOUDY & CHANDLER.

Endorsed: Filed January 20th, A. D. 1869.

WILLIAM H. BRADLEY.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States, northern district of Ohio.

WILLIAM C. SHELDON
vs.
THE CITY OF CHICAGO *et al.* } In chancery.

To the honorable judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

William C. Sheldon, who is a citizen of the State of New York, brings

this his bill of complaint against the city of Chicago, A. H. Heald, collector of said city of Chicago; John R. Turner, Voluntine C. Turner, George F. Rumsey, and Jacob Rehm, who are citizens of the
6 State of Illinois.

And thereupon your orator complains and says that the general assembly of the State of Illinois, at its regular session begun on the first Monday of January, 1859, passed an act entitled "An act to promote the construction of horse railways in the city of Chicago," which was approved February 14, 1859, and in and thereby William B. Ogden, John B. Turner, Charles V. Dyer, James H. Rees, and Voluntine C. Turner, and their successors, were created a corporation by the name of the North Chicago City Railway Company, with power to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turnouts, side tracks, and appendages, in the city of Chicago, and in, on, over, and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the then or future limits of the north division of the city of Chicago, as the common council of said city should authorize said corporation so to do, in such manner, and upon such terms and conditions, and with such rights and privileges as the said common council has, or may, by con-
7 tract with said corporation prescribe, as will more fully appear by a copy of said act, filed herewith as Exhibit A, and made a part of this bill of complaint, the same as if the same was fully received herein; that afterwards, on the 23d day of May, 1859, by virtue of the power conferred in said act, and in pursuance of its provisions, the common council of the city of Chicago passed an ordinance, in and by which there was granted to the North Chicago City Railway Company aforesaid, the consent, authority, and permission of the common council to lay a single or double tracks in and along certain streets, and to operate railway cars thereon, in the manner, and for the time, and upon the conditions in said ordinance prescribed, and among other streets named the following, to wit: Commencing on Clarck street at its intersection with North Water street, and extending thence north on North Clark street to Green Bay road; thence on Green Bay road to the then or future limits of the city; also beginning on Clark street at the intersection of
8 Division street; thence west on Division street to Clybourne avenue, also commencing on Chicago avenue, at its intersection with Rush street, and running thence west on Chicago avenue to the north branch of the Chicago River; and, among other terms and conditions, fixed in and by said ordinance, it was provided that said company should, as respects the grading, paving, macadamizing, filling, or planking of the streets or parts of streets upon which they should construct their said railways, or any of them, keep eight feet in width along the line of said railway on all streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition, during all the time to which the privileges thereby granted should extend in accordance with whatever order or regulation respecting the ordinary repairs thereof may be passed or adopted by the common council of said city, and it should be liable for all the legal and consequential damages which may be sustained by any person, by reason of the carelessness, negligence, or miscon-
9 duct of any of the agents or servants of said company, in the course of their employment in the construction or use of said railways, or either of them, as will more fully appear by reference to a copy of said ordinance, which is herewith filed and made a part of this bill of complaint as Exhibit B.

And your orator further sheweth that the said city of Chicago afterwards, on the 9th day of June, 1859, caused a copy of said ordinance made Exhibit B as aforesaid to be certified under the seal of the city and signed by the city clerk, and delivered to said corporation, and on the same day said ordinance was accepted by said corporation, and the president and secretary were authorized to execute the bond required by said ordinance, and such bond was executed, delivered to, and accepted by the city of Chicago.

And your orator avers that by means of said ordinance and its acceptance by the corporation as aforesaid, under the power and authority conferred by the State of Illinois upon the common council of the city of Chicago, a contract was made and entered into by and
10 between the State and said corporation with the terms and conditions fixed in said act of incorporation, and said ordinance passed thereunder, and in and by said contract the said company were to be exempt from all special assesments to pay for filling, curbing, grading, paving, macadamizing, or planking any of the streets or parts of streets occupied by its tracks, and were bound to keep eight feet in width along the line of railways where a single track was laid, and sixteen feet in width where a double track was laid, in good repair and condition, in accordance with whatever order or regulation with respect to the ordinary repairs thereof might be passed or adopted by the common council, and were liable for the legal and consequential damages arising from the carelessness, negligence, or misconduct of the agents or servants of the corporation.

And your orator further sheweth that said company executed the bond as required by the contract, and proceeded to construct, maintain, and operate the several lines of railway mentioned in said ordinance in accordance with the same and subsequent amendments thereto, and in so doing invested a large amount of money, to wit, $400,000,
11 and now has invested therein about that amount upon the faith that said contract was valid and binding in all its parts, and would be faithfully observed by the State of Illinois and the city of Chicago.

And your orator further sheweth that under said contract the said company constructed a double-track railway on North Clark street from North Water street to Green Bay road, on Chicago avenue a single-track railway from Clark street to the north branch of the Chicago River, and on Division street from North Clark street to Clybourne avenue, and has for several years last past operated the same, and has during all that time kept in good repair and condition the parts of such streets required by said contract, and in the manner therein prescribed, except when the said city has stopped the use of said railways temporarily for the purpose of making improvements in said streets.

And your orator further sheweth that the city of Chicago, its common council, and all its officers, and said company, at all times prior to 1866 or 1867, understood and construed the said contract to exempt
12 the said company from all liability to assessment for the filling, grading, planking, macadamizing, or paving any streets or parts of streets in said city, and no such assessment or claim of right to make one was made prior to the time mentioned; and upon the faith of such construction and understanding, as well as the express terms of the contract, the said company constructed the railways last named, and invested a very large sum of money, and also observed and performed the contract in every respect.

And your orator further sheweth that after the said contract had been

made as aforesaid, the legislature of the State of Illinois, by an act entitled "An act concerning horse railways in the city of Chicago," passed February 6th, 1865, ratified and approved said contract, as will more fully appear by reference to a copy of said act filed herewith as Exhibit C, and made a part of this bill of complaint.

And your orator further sheweth that some time in the year 1865 the board of public works, being authorized to make a special assessment for the filling and paving of the streets, made a special assessment on the property deemed benefitted by the proposed improvement, for the purpose of filling and paving with wooden-block pavement North Clark street from the Chicago River to Chicago avenue, a distance of over one-half mile, and at a time when the said company was operating its cars on railway tracks for the greater part of said distance, and following the uniform course theretofore pursued, no assessment was made against said company or any of its property; and afterwards application was made by the collector of said city to the superior court of Chicago, in February, 1866, in due course of collecting such assessment for judgement against some of the property assessed for benefits, and objection was made to the rendering of a judgement by a part of the owners of property so assessed for several reasons, and among others, because no assessment had been made against said company or its property for benefits; and this objection was sustained by said court and a judgement refused; from which decision the city of Chicago appealed to the supreme court of the State of Illinois, and afterwards, as of the September term, 1866, said supreme court affirmed the judgement and decision of the superior court of Chicago, holding that said company was liable to be assessed for such improvements for reasons which will fully appear in the opinion of said court, reported in the volume forty-one of Illinois reports, page 306, to which reference is hereby made; and your orator prays that the same may be taken and considered as a part of this bill of complaint as fully as if the same was set forth at large herein. And your orator avers that such decision by the supreme court of the State of Illinois, an appellate court of final resort, was the making of a law by a State impairing the obligations of a contract contrary to the provisions of the Constitution of the United States, and inconsistent with the law as declared by the same court at the time said contract was made and entered into.

And your orator further sheweth unto your honors that the board of public works of the city of Chicago, being the officers designated by the charter of said city to take charge of and improve the streets, and for that purpose to make special assessments upon the real estate by them deemed benefitted by any proposed improvement of these streets, wrongfully claiming under color of the decision of the supreme court as aforesaid, that said company or its property was liable to be assessed for new improvements in the streets occupied by such company, did, in and during the year 1868, make several special assessments against "the right of way or easement, superstructure, tracks, turnouts, switches, and all interest of the North Chicago Railway Company (meaning the North Chicago City Railway Company) in the parts of the several streets proposed to be improved for the distance occupied by said company, reported the same to the common council of said city, which wrongfully, and without lawful entered orders of confirmation, which were approved by the mayor of the city, and afterwards warrants were issued for the collection of the sums so assessed against the property of said company and placed in the hands of A. H. Heald, city collector, who is now endeavoring to collect all of such assessments; and

your orator believes and fears that the city of Chicago, through
16 the said city collector, will collect the same, unless restrained by a court of competent jurisdiction.

And your orator sets forth the following list and descriptions of the assessments so made as aforesaid in and during the year 1868, now in the hands of said city collector, to wit:

1st. An assessment for curbing with curb-stone, grading and paving with wooden-block pavement North Clark street, from the north line of Division street to the south line of North avenue. Confirmed by the common council of Chicago, September 7, 1868, for the gross sum of $41,183 30 for the whole improvement, and the sum of $7,071 23 upon the property described as aforesaid, belonging to said company; for the collection of which a warrant, No. 370 north, was issued September 12, 1868.

2d. An assessment for curbing with curb-stone, grading, and paving with wooden-block pavement North Clark street, from the north line of Chicago avenue to the north line of Division street, to make
17 up the amount which said city failed to collect of and from an assessment made during the year 1867, the gross amount of which was $36,141 59 for the whole proposed improvement, and the sum of $7,645 00 was assessed against the property of said company as aforesaid, and said assessment was confirmed by the common council Oct. 19, 1868, and warrant was issued therefor October 26, 1868, No. 547 north.

3d. An assessment for curbing with curb-walls, filling to grade, and paving with wooden-block pavement North Clark street, from the Chicago River to the north line of Chicago avenue, to make up the amount which the city failed to collect of and from an assessment made in 1867, the gross amount of which was $55,732 84 for the whole proposed improvement, and the sum of $8,686 21 was assessed against the property of said company as aforesaid, and said assessment was confirmed October 19, 1868, and a warrant, No. 532 north, issued therefor October 24, 1868.

4th. An assessment for curbing with curb-stone, filling, and paving with wooden blocks Division street from the west line of North Clark street to the west line of Clybourne avenue, for the gross sum of $27,276 for the whole proposed improvement, of which the sum of
18 $5,274 50 was assessed against the property of said company as aforesaid, and said assessment was confirmed October 19, 1868, and a warrant, No. 554 north, issued therefor.

And your orator further sheweth that the orders of confirmation so made as aforesaid by the common council are, by the provisions of the charter of said city, final, and no appeal, writ of error, or certioraris can be taken therefrom.

And your orator avers that none of said assessments or any part thereof are made for keeping said streets or any of them in good repair and condition in accordance with any order or regulation respecting the ordinary repairs thereof, but no pavement has ever been laid in such streets, and such assessments are made for the first paving thereof.

And your orator avers that the property of said company described in said several assessment rolls and assessed is and was not real estate, and therefore was not liable to assessment, and there was no law of the State of Illinois authorizing the assessments to be made on any kind of property other than real estate.

And your orator avers that said assessments are in violation of
19 the contract so made as aforesaid between the State of Illinois, through the common council of the city of Chicago, and said company, and impair the obligation of the contract in violation of the

Constitution of the United States. And your orator avers that for all other causes and reasons all of said assessments are void.

And your orator further sheweth that he is and has been for more than a year last past a stockholder in the North Chicago City Railway Company, and the owner of one hundred shares of one hundred dollars each; that for and during the year 1868, Valentine C. Turner, George F. Rumsey, John B. Turner, Jacob Rhem, and William C. Goudy were the directors of said company and still are; that on the 11th day of January, 1869, at a regular meeting of the board of directors, your orator presented a communication to said board requesting them to take steps to prevent the collection of the illegal assessments herein before set forth; and thereupon said board passed a resolution by a majority vote (the said William C. Goudy voting against it), declining to take any steps in the matter, as will more fully appear by a copy thereof
20 herewith filed, marked Exhibit D, and made a part of this bill of complaint.

And your orator expressly charges that the payment of such illegal assessments, or any of them, or any part thereof, by the said board of directors, will be a waste of the funds of said company, without any equivalent or valid consideration; and for the reasons aforesaid, your orator is without any adequate remedy, except by the aid of a court of equity.

To the end, therefor, that the said city of Chicago, A. H. Heald, collector, as aforesaid; John B. Turner, Volentine C. Turner, George F. Rumsey, and Jacob Rehm may full, true, and perfect answer make to all and singular the premises and allegations of this your orator's bill of complaint, (but not upon oath, their several oaths being hereby expressly waived), and that the said city of Chicago, and A. H. Heald, said collector, may be perpetually enjoined and restrained from collecting by process of law, or otherwise; and the said John B. Turner, Valentine C. Turner, George F. Rumsey, and Jacob Rehm, directors of said North Chicago City Railway Company, and their agents or attorneys, be enjoined and restrained from paying said assessments so levied as aforesaid, or any or either of them, or any part thereof; and that your
21 orator may have such other and further relief as to equity and good conscience shall seem meet:

May it please your honors to grant unto your orator a writ of injunction issuing out of and under the seal of this court, restraining and enjoining the city of Chicago and A. H. Heald, the collector of said city of Chicago, from collecting or attempting to collect, by distress or process of law, the said several assessments, or any or either of them, or any part thereof, and from obtaining any judgment or judgments for the said several sums, or either or any part thereof, assessed against the North Chicago City Railway Company, as aforesaid, for the improvement of Division street or North Clark street; and a writ of injunction restraining the said John B. Turner, Valentine C. Turner, George F. Rumsey, and Jacob Rehm, from paying said assessments, or any of them, or any part thereof, out of the funds or assets of said Chicago Railway Company.

And that a subpœna issue out of said court commanding the said defendants to appear before this court upon a day certain, &c., and abide by the order and decree of this court in the premises; and your orator will ever pray, &c.

WILLIAM C. SHELDON,
By GOUDY & CHANDLER,
His Solicitors.

GOUDY & CHANDLER, *Sol'rs for Complainant.*

22 STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

William C. Goudy, being duly sworn, on oath says that he is one of the solicitors of the complainant in the foregoing bill of complaint, and that the said complainant resides in the city of New York, in the State of New York, and, as affiant is informed and believes, is at the present time in said city of New York, so that his affidavit cannot be obtained without great delay; and affiant further says that he has read the said bill of complaint, and understands the contents thereof, and that the same is true in substance and in fact, except as to such matters as are stated upon information and belief, and as to those matters and things, he believes it to be true.

W. C. GOUDY.

Subscribed and sworn to before me this 19th day of January, A. D 1869.

[SEAL.] GEORGE CHANDLER,
Notary Public.

23 *"Exhibit A".—The North Chicago city railway charter and ordinances.*

An act to promote the construction of horse railways in the city of Chicago.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, That Franklin Parmelee, Liberty Bigelow, Henry Fuller, and David A. Gage, and their successors, be, and they are hereby, created and constituted a body corporate and politic by the name of the "Chicago City Railway Company," for the term of twenty-five years, with all the powers and authority incident to corporations, for the purposes hereinafter mentioned.

SEC. 2. The said corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turnouts, side stacks, and appendages, in the city of Chicago, and in, on, over, and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south and west divisions of the city of Chicago, as the common council of said city have authorized said
24 corporators, or any of them, or shall authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges as the said common council has, or may, by contract with said parties, or any, or either of them prescribe; but said corporation shall not be liable for the loss of any baggage carried in said railways, kept in and under the care of its owner, his servant, or agent.

SEC. 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time at the pleasure of said corporation. It shall be divided into shares of one hundred dollars each, and be issued and transferred in such manner and upon such conditions as the board of directors of said corporation may direct.

SEC. 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint. The first board of directors shall consist of said Franklin Parmelee, Liberty Bigelow, Henry Fuller, and David A. Gage, and thereafter of not less than three nor more than seven

stockholders, who shall be chosen each and every year by the stockholders, at such time and in such manner as the said corporation shall by its laws prescribe. The said directors shall hold their offices
25 until their successors are elected and qualified, and may fill any vacancies which may happen in the board of directors by death, resignation, or otherwise. They may also adopt such by-laws, rules, and regulations for the government of said corporation, and the management of its affairs and business as they may think proper, not inconsistent with the laws of this State.

SEC. 5. The said corporation is hereby authorized to extend the said several railways herein authorized to be built in the manner aforesaid, to any point or points within the county of Cook, in this State, and to enable said corporation to construct any or all the railways herein authorized, or their appendages, the said corporation is hereby vested with power to take and apply private property for the purposes, and in the manner prescribed by an act entitled "An act to amend the law condemning right of way for purposes of internal improvement," approved June 22, 1852, and the several acts amendatory thereof; and may exercise all the powers conferred upon railroad corporations by the twenty-fifth and twenty-sixth sections of "An act to provide for a general system of railroad incorporations," approved November 5, 1849; ascertaining and making recompense for all damages sustained, agree-
26 ably to the provisions of the act hereinbefore first mentioned.

SEC. 6. The said corporation is hereby authorized with the assent of the supervisors of any township, to lay down and maintain its said railway or railways, in, upon, over, and along any common highway in said township, but in such manner as not to obstruct the common travel of the public over the same. In all cases when vehicles shall meet the cars or carriages of said railways, either in the city or county, said vehicles shall give way to the cars or carriages of the railway.

SEC. 7. All the rights and privileges granted or intended so to be, to the said Franklin Parmelee, Liberty Bigelow, Henry Fuller, and their associates, in and by the ordinances of the common council and the amendments thereto, are hereby in all things affirmed, and shall pass to and become vested in the corporation hereby created.

SEC. 8. Nothing herein contained shall authorize the construction of more than a single strack, with the necessary turnouts, which shall only be at street crossings upon State street, between Madison and Twelfth streets, except by the consent of the owners of two-thirds of the property in lineal measurement, lying upon said State street, between Madison and Twelfth streets aforesaid; nor shall anything herein con-
27 tained be construed to authorize the company hereby incorporated, to permit the cars of any other railroad company whatever, propelled by steam, to be run along or upon the railway of the company hereby incorporated.

SEC. 9. The said company hereby incorporated shall, within two years from the passage of this act, erect, maintain, and operate two railways; one from Lake street to the southern boundary of the city, and one from the south branch of the Chicago River, on Madison street, to the western boundary of said city; and upon failing to do so, this act and all the privileges and franchises hereby conferred shall cease and determine.

SEC. 10. All the grants, powers, privileges, immunities, and franchises conferred upon, and all duties and obligations required of Franklin Parmelee, Liberty Bigelow, Henry Fuller, and David A. Gage by this act, for the south and west divisions of the city of Chicago, and the county of Cook, are hereby conferred upon and required of William B.

Ogden, John B. Turner, Charles V. Dyer, James H. Rees, and Valentine C. Turner, by the name of the North Chicago City Railway Company for the north division of said city and said county of Cook,
28 as fully and effectually, to all intents and purposes, as if they had been by a separate act incorporated with all of said grants, powers, privileges, immunities, and franchises conferred upon them, and all of said duties and obligations imposed upon them; and the said last-named corporation may take, hold, mortgage, and convey real estate.

SEC. 11. This act shall be deemed a public act and noticed by all courts as such, without pleading, and shall take effect from its passage.

WM. H. BISSELL.

Approved February 14, 1859.

WM. R. MORRISON,
Speaker of House of Representatives.
JOHN WOOD,
Speaker of the Senate.

"Exhibit B."—Ordinances.

An ordinance authorizing the construction and operation of horse railways in the north division of the city of Chicago.

SECTION 1. Be it ordained by the common council of the city of Chicago, that there is hereby granted to the North Chicago City Railway Company the consent, authority, and permission of the common council to lay a single track for a railway, with all necessary and
29 convenient tracks for turnouts, side-tracks, and switches in and along the course of certain streets in the city of Chicago, hereinafter mentioned, and to operate railway cars and carriages thereon in the manner and for the time and upon the conditions hereinafter prescribed: Provided, however, that except in turning street corners said track shall not be laid within twelve feet of the sidewalks upon any of the streets.

SEC. 2. The said company is hereby authorized to lay a single or double track for a railway in and along of any or all the following streets in said city, to wit:

Commencing on Clark street, in the north division of said city, at its intersection with North Water street, and extending thence north on Clark street to Green Bay road; thence on Green Bay road to the present and future northern city limits.

Also, beginning on said Clark street, at the intersection of Division street; thence west upon Division street to Clybourne avenue; thence on Clybourne avenue to Racine road; thence in the same direct line to the northern city limits, whenever a street shall be opened on said line to said city limits.

Also, beginning on said Clark street, at the intersection with Michigan street, and extending thence east on Michigan street to Rush street; thence north on Rush street to Chicago avenue; thence on Green Bay road to Wolcott street; thence north on Wolcott street to Elm street; thence west on Elm to Clark street.

Also, commencing on Wells street, at its intersection with
30 North Water street, and running thence north to Division street; thence west on Division street to Sedgwick street; thence north on Sedgwick street to its intersection with the Green Bay road.

Also, commencing on Chicago avenue, at its intersection with Rush

street, and running thence west on Chicago avenue to the north branch of the Chicago River.

SEC. 3. The cars to be used upon said track shall (within the limits of said city) be propelled by animal power only, and the said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary luggage, and the cars or carriages used for that purpose shall be of the best style and class in use on such railways.

SEC. 4. The common council shall have power at all times to make such regulations as to rate of speed and time or times of running said cars or carriages as the public safety or convenience may require: Provided, that the common council shall not require said company to run any carriage or car earlier than five o'clock in the morning, nor later than eleven o'clock in the night.

SEC. 5. The tracks of said railways shall not be elevated above
31 the surface of the streets; shall be laid with modern improved rails; and shall be so laid that carriages and other vehicles can easily and freely cross said tracks at any and all points, and in any and all directions, with the least obstruction possible.

SEC. 6. The rates of fare for any distance within the city limits shall not exceed five cents for each passenger, except when cars and carriages shall be chartered for a specific purpose.

SEC. 7. The said company shall, as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of streets, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all streets whereon one track is constructed, and sixteen feet in width along the line of said railway when two tracks are constructed, in good repair and condition during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof may be passed or adopted by the common council of said city. And the said company shall be liable for all the legal consequential damages which may be sustained by any person by reason of the carelessness,
32 negligence, or misconduct of any of the agents or servants of said company in the course of their employment in the construction or use of said railways, or either of them.

SEC. 8. Unless the said railway, commmencing on said Clark street, at its intersection with North Water street, and extending north to Green Bay road, and thence on Green Bay road to the present and future northern city limits, shall be completed and ready for use on or before the first day of January, A. D. 1860; and unless the said railway, commencing on said Clark street, at its intersection with Division street, and thence west on Division street to Clybourne avenue; thence on Clybourne avenue to Racine road; thence on the same direct line to the northern city limits, shall be completed on or before the first day of July, A. D. 1862, or within six months after a street shall have been opened from the intersection of Clybourne avenue and Racine road, on the same direct line with said Clybourne avenue to the northern city limits; and unless the said railway, beginning on said Clark street at its intersection with Michigan street, and running thence east on Michigan street to Rush street; thence north on Rush street to Chicago avenue;
33 thence on Green Bay road to Wolcott street; thence north on Wolcott street to Elm street; thence west on Elm street to Clark street, shall be completed on or before the first day of January, A. D. 1861; and unless all the remaining railways herein mentioned shall be completed on or before the first day of January, A. D. 1862, then the

rights and privileges granted to said company by virtue of this ordinance shall be forfeited to said city of Chicago, unless the common council thereof shall grant to said company a further extension of time to construct the same: Provided, however, that nothing in this ordinance shall be so construed as to cause a forfeiture of any of said lines which shall be completed previous to the time herein specified for their respective completion; and provided, further, that if said company shall be delayed by order or injunction of any court having competent jurisdiction, the time of such delay shall be excluded, and the same time in addition to the periods above prescribed, shall be allowed for the completion of said railway, as that during which they may be so delayed.

SEC. 9. All the rights heretofore vested in the board of water commissioners and sewerage commissioners, or other corporations,
34 are not to be affected by this ordinance; but the rights and privileges hereby granted are subject thereto.

SEC. 10. The rights and privileges granted to the said company by this ordinance, or intended so to be, shall continue and be in full force for the benefit of said company for the full term of twenty-five years from the passage of this ordinance and no longer.

SEC. 11. The North Chicago City Railway Company shall enter into a bond with the city of Chicago, in the penal sum of twenty-five thousand dollars, conditional for the faithful performance by said company of all the terms and conditions of this ordinance; and that the railways aforesaid shall be completed at the times and in the manner in this ordinance specified, unless delayed by the order or injunction of some court of competent jurisdiction from so completing the same; and until such bond is made by said parties this ordinance is to have no force or effect whatever.

Passed May 23d, 1859.

Approved:

JOHN C. HAINES, *Mayor.*

Attest:

H. KREISMANN, *Clerk.*

STATE OF ILLINOIS, *City of Chicago, ss:*

35 I, H. Kreismann, clerk of the city of Chicago, do hereby certify that the foregoing is a complete and true copy of an ordinance or record, and now on file in my office.

Witness my hand and the corporate seal of said city of Chicago this 9th day of June, A. D. 1859.

H. KREISMANN, [SEAL.]
City Clerk.

"*Exhibit C.*"

An act concerning horse railways in the city of Chicago.

SEC. 1. Be it enacted by the people of the State of Illinois represented in the general assembly: That the first section of an act of said general assembly entitled "An act to promote the construction of horse railways in the city of Chicago," approved February 14, 1859, and the first section of a certain other act of said general assembly entitled "An act to authorize the extension of horse railways in the city of Chicago," approved February 21, 1861, be and the same are hereby so amended as that all the words in said respective sections after the word "company"

therein, respectively, shall be and read as follows, viz: For ninety-nine years, with all the powers and authority hereinafter expressed, or pertaining to corporations for the purposes hereafter mentioned.

SEC. 2. That the second section of the act first above referred to by its title, and which section is included in and made a part of the act secondly above referred to, by the title thereof, be and the same is hereby, as to both of said acts, so amended as to read as follows, viz: The said corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turnouts, side-tracks, and appendages, in the city of Chicago, and in, on, over, and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south and west divisions of the city of Chicago, as the common council of said city have authorized said corporators, or any of them, or shall, from time to time, authorize said corporations, or either of them, so to do, in such manner, and upon such terms and conditions, and with such rights and privileges, immunities, and exemptions, as the said common council has or may, by contract with said parties, or any or either of them, prescribe; and any and all acts or deeds of transfer of rights, privileges, or franchises, between the corporations in said several acts named, or any two of them, and all contracts, stipulations, licenses, and undertakings, made, entered into, or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force during the life hereof, as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part of said several acts: Provided, that it shall be competent for the said common council, with the written consent or concurrence of the other party or parties, or their assigns, to any of said contracts, stipulations, licenses, or undertakings, to amend, modify, or annul the same. But said corporations shall not, or any, or either of them, be liable for the loss of any property or thing carried on said railways kept in and under the care of its owner, his servant, or agent: Provided, that any contract hereafter made by the common council of the city of Chicago with either of the corporations referred to in this act, for a higher rate of fare than five cents, shall be subject to modification or repeal at any regular meeting of said common council, by a majority vote of all the aldermen elected, or by the general assembly of the State of Illinois.

SEC. 3. An ordinance of the common council of the city of Chicago entitled "An ordinance concerning the maintenance and operation of the Chicago & Evanston railroad, in the limits of the city of Chicago," as passed on the 17th day of August, A. D. 1864, is hereby confirmed, and shall be deemed and held to confer on the Chicago & Evanston Railroad Company, power and authority to construct and operate their road in the streets and over the bridge mentioned therein, until the same is altered, changed, or amended by the common council, with the consent of said company, and such ordinance may, from time to time, be changed, altered, or amended, and such other provisions be made as to the common council may seem proper, and be agreed to by said company. The prohibition as to the use of certain streets in the second section of the charter of the Chicago & Evanston Railroad Company is hereby re-enacted, and shall remain in force until altered, released, or amended by the common council of the city of Chicago and said company.

SEC. 4. Each of said corporations shall be authorized to purchase, hold, and convey real or personal estate necessary for the use of such corporation, and to manufacture materials, machinery, and rolling stock for the use of such corporation

SEC. 5. This act shall be deemed a public act, and noticed by all courts as such without pleading, and shall take effect from its passage.

Passed, notwithstanding the objections of the governor, by both branches of the general assembly, February 6th, 1864.

"*Exhibit D.*"

To the board of directors of the North Chicago City Railway Company:

The undersigned, a stockholder in your company, would respectfully call your attention to the special assessment levied against said company and its property by the city of Chicago, for the improvement of North Clark street and other streets, now in process of collection, and ask you to take such action as may be necessary to prevent the collection of the same, such assessments being unauthorized as he has been advised.

(Signed) WM. C. SHELDON,
By W. C. GOUDY, *his Att'y.*

Whereas the board of directors have been requested by William C. Sheldon, a stockholder, to resist the collection of the special assessment now in process of collection against this company and its property for the improvement of certain streets in the city of Chicago:

Resolved, That the request be declined; and that Mr. Sheldon and the stockholders be left to pursue such remedy as they may see proper.

Ayes: J. B. Turner, J. C. Turner, & G. F. Rumsey.

Noes: W. C. Goudy.

Attest:

S. H. TURNER,
Sec'y N. C. C. R'y Co.

(Endorsed:) Filed Jan'y 20th, 1869.

WM. H. BRADLEY, *Clk.*

On this day, to wit, the twentieth day of January, A. D. 1869, a writ of subpœna issued out of said clerk's office against said defendants, in said entitled cause; which said writ, together with the memorandum thereto attached, and the return of the marshal thereon, is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the city of Chicago, A. H. Heald, collector, &c.; John B. Turner, Valentine C. Turner, George F. Rumsey, and Jacob Rehm, greeting:

We command you and [and] every of you, that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of February next, to answer the bill of complaint of William C. Sheldon this day filed in the clerk's office of said court, in said city of Chicago, there and then to receive and abide by such judgment and decree as shall there or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this
42 twentieth day of January, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-third year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents, that I have appointed, and by these presents, do appoint, S. H. Tourtellotte my true and lawful deputy, to execute the annexed writ (William C. Sheldon vs. the city of Chicago et al), and to make true return thereon according to law.

J. R. JONES, [SEAL.]
United States Marshal of the Northern District of Illinois.

43 I have served the subpœna hereto attached in manner following, to wit, upon the city of Chicago therein named, by delivering a true copy thereof to John B. Rice, the mayor thereof, on the 20th day of January, A. D. 1869; and on the 21st day of January aforesaid upon A. H. Heald therein named, by delivering a true copy thereof to him personally; and on the 22nd day of January aforesaid by delivering a true copy thereof to John B. Turner and Valentine C. Turner therein named, and upon George F. Rumsey, by leaving a true copy thereof at his house, 331 Huron st., Chicago, Illinois, with Minnie Kattenegger, for him, she being a free white person above 15 years of age, and a member of his family; and on the 29th day of January, A. D. 1869, by delivering a true copy thereof to Jacob Rehm therein named.

J. R. JONES, *U. S. Marshal,*
By S. H. TOURTELLOTTE, *Special Deputy.*

(Endorsed:) Filed Feb'y 1st, A. D. 1869.

WM. H. BRADLEY, *Clerk.*

On this day, to wit, the thirtieth day of January, A. D. 1869, in the record of the proceedings of the court in said entitled cause, is the following entry, to wit:

44 WILLIAM C. SHELDON
vs.
THE CITY OF CHICAGO, A. H. HEALD, collector, &c.; John B. Turner, Valentine C. Turner, George F. Rumsey, and Jacob Rehm. } Chancery.

Now comes the complainant, by his solicitor, and moves the court for an injunction against the defendants; and it appearing to the court that S. A. Irvine, esq., the solicitor of the defendants, had had notice of this application, and no objection being made, it is ordered by the court that

an injunction issue against the defendants, enjoining and restraining them as prayed for in the bill of complaint herein.

On this day, to wit, the twenty-fourth day of June, A. D. 1869, came said complainant, by his solicitors, and filed in said clerk's office his amendment to said bill of complaint; which said amendment is in
45 the words and figures following, to wit:

United States circuit court, northern district of Illinois.

WILLIAM C. SHELDON
vs.
THE CITY OF CHICAGO *& al.* } In chancery.

To the honorable the judges of circuit court, in chancery sitting, for the northern district of Illinois:

William C. Sheldon, who is a citizen of the State of New York, makes this his amendment, by leave of the court first had and obtained, to his bill of complaint against the city of Chicago, John B. Turner, Voluntine C. Turner, George F. Rumsey, and Jacob Rehm, who are citizens of the State of Illinois, and the northern district of Illinois.

And thereupon your orator says that on the 20th day of August, 1864, the common council of the city of Chicago, by virtue of the power conferred in and by the charter of [of] the said North Chicago City Railway Company, a copy of which is attached to and filed with the original bill as Exhibit A, passed an ordinance entitled "An
46 ordinance authorizing the North Chicago City Railway Company to extend their tracks on certain streets," a copy of which is hereto filed and marked Exhibit D, and made a part of this amendment to the bill.

Your orator further says and avers that "the right of way or easement, superstructure, tracks, turnouts, switches, and all interest of the North Chicago City Railway Company," in the parts of streets described as being assessed in the original bill, at the time of such assessments, was not of a greater value than seventy five thousand dollars; and the ties, stringers, chairs, rails, and road-bed in the parts of streets so described in the bill as having been assessed at the time of the assessments, was not of a greater value than forty thousand dollars.

Your orator further says and avers that on the 16th day of August, 1864, the common council of the city of Chicago passed an ordinance entitled "An ordinance prescribing the guage and rail to be used on horse railways in Chicago," which has ever since remained in force, and in and by the ordinance the said North Chicago City Railway Company, as well as other companies, were required to lay an iron rail of a
47 pattern and form therein described, and the 3d section thereof is as follows, to wit: "That in all streets where a railway is now laid or shall hereafter be laid with rails of a different form that hereby prescribed for use, such rails shall be displaced by rails of the form herein prescribed, whenever the common council shall order the streets in which such railways are laid to be paved, graded, macadamized, planked, or otherwise improved, a copy of which is herewith filed as Exhibit E.

And you orator avers that the rails laid and in use in the parts of the streets described in the original bill as having been assessed, was, at the time of such assessments, of a different form and pattern from that prescribed in the ordinance.

Your orator further says & avers that by means of rule laid down as to iron rails in said ordinance, and the making of the proposed improvements, it is necessary when they are made the parts of streets paved to take up the stringers, ties, road-bed, & iron rails, and replace them by new materials, and the cost of so doing on the parts of streets so assessed will not amount to less than forty thousand dollars, and when such new pavement is made the property of the railway company assessed will not be increased in value.

48 And your orator prays & asks that this his amendment may be inserted and read as a part of the original bill at the bottom of page 15 after the words "but no pavement has ever been laid in such streets and the assessments were made for the first paving thereof."

WILLIAM C. SHELDON,
By his solicitors, GOUDY & CHANDLER.

W. C. GOUDY, *of Counsel.*

Exhibit E.

An ordinance prescribing the gauge and rail to be used on horse railways in the city of Chicago.

SECTION 1. Be it ordained by the common council of the city of Chicago, that the gauge of all horse or other city railroads in the city of Chicago, now laid, or hereafter to be laid, is hereby fixed at four feet eight and one-half inches.

SEC. 2. That excepting, as hereinafter provided, all rails which shall hereafter be laid on any horse railroad track, or other city railroad track, on the streets, alleys, or other public grounds of the city of Chicago, shall be a tram rail, having a profile taken crosswise of the rail

49 such as is shown on the sketch following marked "A profile rail to be used in the streets of the city of Chicago."

The width of said rail, from outside to outside, shall be six (6) inches; the width of the tram shall be four (4) inches, having a horizontal part of two and one-half ($2\frac{1}{2}$) inches, and an inclined part of one and one-half ($1\frac{1}{2}$) inches, having a rise of five-sixteenths ($\frac{5}{16}$) of an inch; the height along the wagon edge, or the height from the tram to the highest part of the rail shall not be more than seven-eighths ($\frac{7}{8}$) of an inch; the upper part of the rail shall be laid below the level of the surface of the street, and the whole manner of constructing said railways, so as to carry out the provisions of this ordinance, shall be under the direction of the board of public works.

An exception to the immediate operation of this section, so far as the four-inch tram of the rail is concerned, is made as follows, viz:

The several railway companies now operating horse railways in said city are authorized to use such rails as they have on hand and have actually contracted for, of different pattern from the rail herein prescribed, but the same shall be laid in such manner as the board of public works shall direct

SEC. 3. That in all streets where a railway is now laid, or shall

50 hereafter be laid with rails of a different form from that hereby prescribed for use, such rails shall be displaced by rails of

Exhibit D.

An ordinance authorizing the North Chicago City Railway Company to extend their tracks on certain streets.

SECTION 1. Be it ordained by the common council of the city of Chicago, that permission and authority be and is hereby granted to the

North Chicago City Railway Company to construct, maintain, and operate a single or double track railway, with the necessary curves and side-tracks, as an extension of the lines of railway now operated by said company, on the following streets, to wit: Commencing at Chicago avenue and running on Larrabee street to Little Fort road, and thence on Little Fort road to the present or future city limits, and commencing at Larrabee street and running east on Linden and Eugenie streets to Wells street, and thence across Wells street and on any street that may hereafter be laid out to Green Bay road; except that on Larrabee street from Chicago avenue to the north side of Hawthorne avenue, only a single track shall be laid.

SEC. 2. The line on Larrabee street, between Clybourne avenue and Centre street, shall be completed within sixty days after the pas-
51 sage of this ordinance, unless restrained by a court of competent jurisdiction, and the other lines of railways hereinbefore mentioned shall be completed as soon as practicable after the passage of this ordinance; but whenever the common council shall determine that the public interest requires any of said lines to be constructed, and pass an ordinance that any of said lines shall be constructed in a period of time not less than ninety days after the passage of said ordinance and actual notice thereof to said company, it shall be the duty of said company to comply with said ordinance, provided the work shall not be required to be done between the first day of November and the first day of May.

SEC. 3. The permission and authority hereby granted are made subject to all the restrictions and conditions, the rights and privileges, mentioned in the ordinance passed by the common council on the 23d day of May, 1859, entitled "An ordinance authorizing the construction and operation of horse railways in the north division of the city of Chicago," except as otherwise herein provided, reserving to the common council the right to regulate the laying down of tracks, and the kind of rails to be used.

SEC. 4. The said railway company shall keep on hand a sufficient number of cars adapted to funeral poposes, in which shall be
52 suitable compartments for the carrying of the corpse itself, and on the application of any person, shall furnish not exceeding three cars, unless more shall be agreed upon at any designated point on the lines of any of its roads, to convey the corpse and persons attending the funeral to any cemetery to which their lines or connections extend. Provided, that, if their funeral cars are all engaged for funeral purposes, before any such application is made, the company shall not be bound to furnish the same until such prior engagement is fulfilled. Said company shall be entitled to charge not exceeding two dollars for each corpse, and not exceeding twenty cents for the round trip for each person conveyed on such funeral ocasion. The said company shall on its part make an arangement with the Chicago City Railway Company, and the Chicago West Division Railway Company, as soon as the bridge is built across Chicago River at State street, to convey the cars of either of said companies used for funeral purposes over the tracks of said North Chicago City Railroad Company to any cemetery to which its lines extend, so that the charge for conveying any corpse from any part of the city, on any of the lines of either of said companies, shall not exceed three dollars, and for each person attending said funeral shall
53 not exceed twenty-five cents for the round trip to and from any such cemetery, which shall be in full for all the charges to all of said companies.

SEC. 5. The said railway company, its successors, or assigns, as respects grading, paving, macadamizing, filling, or planking, shall at their own expense, keep eight feet, where a single track is used, and sixteen feet, where a double track is used, of said streets, or parts thereof so occupied, in good repair, so that wagons, carriages, and other vehicles can pass and repass at any and all points, and in any and all directions, and when any new improvement, paving, repaving, planking, or replanking is ordered by the common council, in any of said streets or parts of streets, the said railway company shall, in the same manner, and with like material as required of the owners of property as to other parts of the street, make such new improvements, on eight feet, where a single track is used, or sixteen feet, where a double track is used; and if the said company shall refuse or neglect to make such new improvement within a reasonable time, to be fixed by the ordinance, the work may be done by the city, and the cost thereof assessed by the board of public works on said company, and collected as other
54 assessments, from any real or personal property of said company. But if the board of public works should deem it expedient that said new improvement should be so made by said company, then the same shall be done by the city as in other cases, and the cost thereof assessed upon and collected of said company in manner as aforesaid; and if the said company shall refuse or neglect to make any necessary repairs as aforesaid, or the repairs required by any ordinance heretofore passed, after twenty days' notice from the board of public works, the city may make the repairs and collect the cost thereof by suit at law in any court of competent jurisdiction.

(Endorsed:) Filed June 24, 1869.

WM. H. BRADLEY, *Clk.*

On this day, to wit, the twenty-fourth day of June, A. D. 1869, came the city of Chicago and A. H. Heald, defendants, impleaded, &c., and filed in said clerk's office their demurrer to the bill of complaint in said entitled cause, and also to the said amended bill; which said demurrer is in the words and figures following, to wit:

55 In the circuit court of the United States for northern district of Illinois.

The joint and several demurrer of the city of Chicago and A. H. Heald, defendants, impleaded, &c., to the bill and amended bill of complaint of William C. Sheldon, complainant.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters or things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer shew:

1. That the said complainant hath a full, complete, and adequate remedy at law.

2. That the complainant's said bill of complaint, in case the same were true, which these defendants in no wise admit, contains not any matter of equity whereon this court can ground any decree, or give complainant any relief or assistance as against them, these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and they pray

56 the judgment of this honorable court whether they shall be compelled to make any further and other answer to the said bill, and they humbly pray to be dismissed from hence with their reasonable costs in this behalf sustained.

S. A. IRVIN, *Sol. for Def'ts.*

The complainant waives the usual affidavit or certificate required by the rules.

GOUDY & CHANDLER,
Compl't's Solicitors.

(Endorsed:) Filed June 24, 1869.

WM. H. BRADLEY, *Cl'k.*

57 On this day, to wit, the twenty-fourth day of June, A. D. 1869, in the record of the proceedings of the court in the said entitled cause is the following entry, to wit:

WILLIAM C. SHELDON *vs.* THE CITY OF CHICAGO—A. H. HEALD, JOHN B. Turner, Voluntine C. Turner, George F. Runsey, and Jacob Rehm.	Chancery.

Now come the complainant, by William C. Goudy, esq., his solicitor, and, on his motion, leave is given him to file an amended bill of complaint herein; and now come the defendants, the city of Chicago and A. H. Heald, by S. A. Irvin, esq., their solicitor, who files their demurrer to the original and amended bills of complaint herein, and said demurrer coming on now to be heard, after arguments by counsel, the same is overruled by the court, and it appearing to the court that the defendants John B. Turner, Voluntine C. Turner, George F. Rumsey, and Jacob Rehm, had been duly served with process, and that they had failed to enter their appearance, or answer the bills of complaint herein in conformity with the rules and practice of this court; and they being now each three times solemnly called, come not, but make default, it is therefore considered by the court, on motion of the complainant's solicitor, that their defaults be entered, and that the said bill of complaint and the matters and things therein contained be taken as confessed and true against the said defendants; and this cause coming in again, and no further appearance being made by the defendants or either of them, and the defendants, the city of Chicago and A. H. Heald, electing to abide
58 by their said demurrer, it is, upon the motion of the complainant's solicitors, Goudy & Chandler, ordered, adjudged, and decreed that the defendants, the city of Chicago and A. H. Heald, be and they are forever and perpetually enjoined from collecting or attempting to collect, and the defendants, John B. Turner, Volentine C. Turner, George F. Rumsey, and Jacob Rehm, from paying from the funds of the North Chicago City Railway Company, any or either of the assessments described in the bill of complaint.

And it is further ordered and decreed that the defendant, the city of Chicago, pay the costs of the complainant in this behalf expended; and thereupon the defendant, the city of Chicago, prays an appeal to the Supreme Court, which is allowed, and by and with the consent and agreement of all the parties hereto, it is ordered that the bond of the city of Chicago be filed in the sum of ten hundred dollars, without security.

59 On this day, to wit, the thirtieth day of June, A. D. 1869, came the defendant, the city of Chicago, by its solicitor, and filed in said clerk's office its appeal bond; which said bond is in the words and figures following, to wit:

Circuit court of United States for northern district of Illinois.

THE CITY OF CHICAGO, appellant, impleaded, &c., }
vs. }
WILLIAM C. SHELDON, appellee. }

Know all men by these presents, that the City of Chicago, and , and , are held and firmly bound unto William C. Sheldon, appellee, in the sum of one thousand dollars, to which payment well and truly to be made the said city of Chicago binds itself and its successors, and the said , and , bind themselves, their heirs, executors, & administrators, jointly & severally, firmly by these presents.

In witness whereof, the city of Chicago hath caused its corporate seal to be hereunto affixed, and these presents to be signed by the acting mayor and comptroller, and attested by the city clerk; and the said and have also signed these presents and affixed their seals thereto, this twenty-ninth day of June, A. D. 1869.

Whereas the above-named William C. Sheldon, complainant, did, on the 24th day of June, A. D. 1869, in the said circuit court of the
60 United States for the northern district of Illinois recover a decree against the said city of Chicago for costs of suit amounting to the sum of dollars; and whereas the said city of Chicago has prosecuted an appeal from said decree to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse said decree rendered as aforesaid:

Now, therefore, the condition of this obligation is such that if the above-named appellant, the city of Chicago, shall prosecute its appeal to effect, or on its failure so to do, shall pay, or cause to be paid, the amount of said decree, which is only for costs, this obligation to be void; otherwise the same shall remain in full force and virtue.

THEODORE SCHINTZ,
Acting Mayor.

[SEAL.] WALTER KIMBALL,
City Comptroller.

Attest:

A. H. RODMAN, *City Clerk.*

Sureties waived—bond satisfactory.

W. C. GOUDY.

Approved:

THOMAS DRUMMOND.

(Endorsed:) Filed June 30, 1869.

WM. H. BRADLEY, *Clk.*

NORTHERN DISTRICT OF ILLINOIS, *ss*:

61 I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the foregoing and above to be a true, correct, and complete transcript from the record of the proceedings of said court of all the proceedings had in said court in chancery in said entitled cause wherein said William C. Sheldon is complainant, and the said city of Chicago et al. are defendants, as appears from the records of said court remaining in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court at my office, in the city of Chicago, in said district, this twenty-third day of August, A. D. eighteen hundred and sixty-nine, and of our independence the ninety-fourth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[Five ct. inter. revenue certificate, canceled: W. H. B., Aug't 23, 1869.]

IN THE

Supreme Court of the United States,

DECEMBER TERM, A. D. 1869.

THE CITY OF CHICAGO,
vs.
WILLIAM C. SHELDON,

Appeal from the Circuit Court for the Northern District of Illinois.

POINTS AND ARGUMENT FOR APPELLANT.

IN THE

Supreme Court of the United States

DECEMBER TERM, A. D. 1869.

THE CITY OF CHICAGO,
vs.
WILLIAM C. SHELDON,

Appeal from the Circuit Court for the Northern District of Illinois.

POINTS AND ARGUMENT FOR APPELLANT.

Statement of the Case.

May it please your Honors:

The city of Chicago, under the provisions of its charter, in the year A. D. 1868, levied four special assessments upon the real estate and property deemed benefited by curbing with curbstone, filling to grade, and paving with wooden block pavement, North Clark street and other streets in said city. Upon the said streets the North Chicago City Railway Company occupied by its superstructure, tracks, switches, a greater part of the distance upon each of said streets which the said city proposed to improve, by and under said assessment proceedings.

These assessments were made in the manner provided by said charter, and subsequently confirmed by the Common Council of said city.

Warrants for the collection of said assessments were delivered to to the city collector.

In these assessments, among other property assessed for benefits to be derived by the proposed improvements, was the property of the appellee, a corporation organized under the laws of the State of Illinois; the property of appellee being described as "the right of way or easement, superstructure, tracks, turnouts, switches, and all interest of the North Chicago (City) Railway Company in the parts of the streets so to be improved, for the distance occupied by said company."

The appellee, William C. Sheldon, being a stockholder in said company, on the 11th of January, 1869, requested the directors of said company to take steps to prevent the collection of the said assessment, and thereupon the board of directors passed a resolution declining to take any steps in the matter and leaving the stockholder to pursue such remedy as he saw proper.

The appellee thereupon filed his bill of complaint, alleging and setting forth the foregoing facts, and also, that said company was organized under an act of the General Assembly of said State, approved February 14th, 1859, entitled "An Act to promote the construction of horse railways in the city of Chicago," whereby certain persons therein named were created a corporation by the name of "The North Chicago City Railway Company," with power to construct, maintain and operate a single or double track railway in, on, over and along such streets, &c.,

of the North division of the said city as the Common Council should authorize, said company so to do in such manner and upon such terms and conditions and with such rights and privileges as the said council had or might, by contract with said corporation, prescribe.

That on the 23d May, 1859, the said Common Council, by virtue of the power conferred by and in pursuance of the provisions of said act, granted said corporation authority and permission to lay a single or double track in and along certain streets, and to operate cars thereon in the manner and for the time and upon the conditions in said ordinance prescribed, among which were the streets upon which said improvements before referred to were to be made.

That among other terms and conditions of said ordinance it was provided *in section 7 thereof, as follows:* "The said company shall, as respects the grading, paving, macadamizing, filling or planking of the streets or parts of the streets upon which they shall construct the said railways, or any of them, keep eight feet in width along the line of said railway, on all the streets whereon one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof may be passed or adopted by the Common Council of said city. And the said company shall be liable for all legal consequential damages which may be sustained by any person by reason of the carelessness or misconduct of any of the agents or servants of the said company in the course of their employment in the con-

struction or use of the railways aforesaid, or any or either of them."

The bill further avers in substance, That said ordinance was accepted by said corporation, and by means of said ordinance, and its acceptance thereof, a contract was made and entered into by and between the State and the corporation on the terms and conditions in said act of the General Assembly and said ordinance, stated, *and that in and by said contract* the said company *were to be exempt from all special assessments to pay for filling, curbing, grading, paving, macadamizing or planking any street or parts of streets occupied by their tracks*, and were only bound to keep a certain number of feet thereof in good repair and condition, in accordance with any order or regulation of said Common Council as to the ordinary repairs thereof, as provided in said section 7.

That upon the faith that the said contract was a valid contract, the company constructed and operated (for several years) its several lines upon said streets, and invested, in so doing, $400,000, and had kept in good repair and condition the parts of such streets required by the contract.

That the city and its officers and said company, at all times prior to 1866 or 1867, construed said contract to exempt said corporation from all special assessments, and that no such assessment or claim to make such was made prior to said time.

That in May, 1864, said council passed an ordinance—which was accepted by said company—whereby said company was authorized to construct and maintain their horse railway tracks in certain other streets, in said ordinance specified, and required

in such streets where any new improvement, paving, repairing, planking or re-planking should be ordered, to make such new improvement on eight feet, where there should be a single track, and on sixteen feet, where there should be a double track; and upon neglect to do so within a reasonable time, the city might do the work and collect the cost thereof by special assessment.

The bill further avers that the alleged contract was ratified by the act of the General Assembly of said State, approved February 6, 1865.

The bill further avers that in the year 1865, "the Board of Public Works being authorized to make a special assessment for the filling and paving of streets, made a special assessment on the property deemed benefited by the proposed improvement, for the purpose of filling, and paving with wooden block pavement, (said) North Clark street, from the Chicago river to Chicago avenue, a distance of over one half mile, and at a time when the said company was operating its cars on railway tracks for the greater part of said distance, and following the uniform course theretofore pursued, no assessment was made against said company or any of its property; *and afterwards application was made by the collector of said city* to the Superior Court of Chicago, in February, 1866, *in due course of proceeding for judgment* against some of the property assessed for benefits, *and objection was made to the rendering of judgment* by a part of the owners of property so assessed, for several reasons, and among others, because no assessment had been made against said company or its property for benefits, and this objection was sustained by said Court and a judgment refused; from which decision the city of Chicago appealed to the Supreme Court of the State of Illinois, and afterwards, at the September term,

1866, said Supreme Court affirmed the judgment and decision of the Superior Court of Chicago, *holding that the company was liable to be assessed for such improvements*, for reasons which will fully appear in the opinion of said Court, reported in the volume 41 of Illinois Reports, p. 306, to which reference is hereby made."

That "such decision by the Supreme Court of the State of Illinois was the making of a law by a State impairing the obligations of a contract, contrary to the provisions of the constitution of the United States, and inconsistent with the law as declared by the same Court at the time said contract was made and entered into."

The bill further avers that the Board of Public Works and city officers, claiming by virtue of and under color of said decision, made said four assessments, and out of $160,333.74, total amount assessed, the sum of $28,676.74 was assessed against the property of said company.

The bill alleges the value of the property assessed, the value of the superstructure assessed, and that by reason of an ordinance requiring a new rail in cases where the street is paved, the company will be put to a stated amount of expense, but does not allege any fraud of the Board of Public Works in estimating benefits, or that the assessment as made is such an abuse of power as to render the assessments void. The averments are so indefinite in this respect as in my opinion to render them unnecessary to be herein set forth.

The bill further alleges that the orders of confirmation of the assessment are, by the city charter final, and no appeal, writ of error, or *certiorari* can be taken therefrom.

That said streets proposed to be improved have never been paved, and that the assessments are not for the keeping the same in repair.

The bill alleges *that the property of said company described in said several assessment rolls and assessed, is and was not real estate*, and therefore was not liable to assessment, and there was no law of the State of Illinois authorizing the assessments to be made on any kind of property other than real estate.

That said assessments are in violation of the contract so made between the State of Illinois, through the Common Council of the city of Chicago and said company, and impair the obligation of the contract in violation of the constitution of the United States.

That the payment of such illegal assessments, or any of them, or any part thereof, by the said board of directors will be a waste of the funds of said company without any equivalent or valid consideration.

The bill prays for an injunction to prevent the city of Chicago and its collector from collecting these assessments, and the directors of the company from paying them.

The demurrer of the city of Chicago and the city collector shows two causes.

1. That the complainant hath a full, complete and adequate remedy at law.

2. That the bill contains not any matter of equity whereon the court can ground any decree or give complainant any relief or assistance as against these defendants.

The court below overruled the demurrer and granted a final decree of injunction.

The provision of charter under which the said assessments were made, Sec. 1, of the Act amending the charter of 1863 provides: "That whenever any order shall be passed by the Common "Council of said city pursuant to the authority conferred by "chap. 7, of the act to which this is an amendment, for the filling, "grading, leveling, paving, curbing walling, * * * * "of any street, lane, alley or highway * * * * * "the commissioners of the Board of Public Works shall forth- "with proceed to assess the amount directed by the Common "Council to be assessed for that purpose, with the costs of pro- "ceedings therein, upon the real estate deemed benefited by any "such improvement, in proportion as nearly as may be, "to the benefit resulting thereto." "The assessment in such case to be made and returned, and may be confirmed and collected in the same manner as provided by sec. 23 and 24 of chap. 7, of the act above mentioned, and the provisions of the two last named sections shall in all respects apply to assessments hereby authorized."

Gary Ord., p. 177.

By the amendments to the charter act of 1867, the Board of Public Works were required "upon receiving an application for the making of any improvement of any street, lane or alley, the said Board shall proceed to investigate the same; and if they shall determine that such improvement is necessary and proper, they shall report the same to the Common Council, accompanied with a statement of the expense thereof, and a proper ordinance or order directing the work, and shall in such estimate, specify how much of said expense in their opinion, may be properly chargeable to real estate specially benefited by such improve-

ment, and how much thereof may be properly chargeable to and paid out of the general fund, or out of the proceeds of any general tax, authorized to be levied by said city."

The Common Council are required, on such report being made, "in the order (for the making of such improvements) to "specify what amount of said estimated expense shall be assessed "upon the property deemed especially benefited, and what "amount shall be chargeable to and be paid out of the proceeds "of the general fund, or out of the proceeds of any general tax "authorized to be levied by said city."—Public Laws of Illinois, A. D. 1867.

Sections 23 and 24 of chap. 7, charter of 1863. Section 23 provides that the commissioners of the board, before proceeding to make an assessment, "Shall be sworn as in other cases, and shall give six days' notice by publication in the corporation newspaper of the time and place of their meeting for the purpose of making said assessment, in which notice they shall specify what such assessment is to be for and the amount to be assessed."

"All persons interested in any such assessment shall have the right to be present and be heard, either in person or by counsel, and the commissioners may, in their discretion, receive any legal evidence."

Sec. 24 provides that "When the commissioners shall have completed their assessment, they shall sign and return the same in like manner, and give like notice of the application to the Common Council for confirmation, as required in relation to assessments for the condemnation of real estate, and all parties in interest shall have the like rights, and the Common Council shall perform the like duties and have like powers in relation

to such assessment as are herein given in relation to assessments for the condemnation of real estate. When confirmed by the Common Council, said assessment shall be final and conclusive upon all parties interested therein, and shall be collected as in other cases, and no appeal shall lie in any case from the order of confirmation."

Gary Ord., p. 70.

Sec. 13, chap. 7, in regard to the condemnation of real estate, provides that the commissioners, after completing the assessment, shall file the assessment roll in the city clerk's office and give six days' notice by publication in the corporation newspaper, that at the next regular meeting of the council to be held after the expiration of such publication they will apply to the council for a confirmation of the assessment; "objections to said assessment may be made before the Common Council," but the objections in writing to be filed in city clerk's office at least one day prior to the meeting of the council, and the council is given power to hear the objections, to revise, correct, confirm or annul the assessment, and that when assessment is confirmed, a warrant shall issue for the collection of the same.

Gary Ord., p. 65.

Secs. 12, 13, 14, 15, provide that the collector shall between certain dates make report to a court of general jurisdiction of all unpaid assessment, and ask for judgment "*against the several lots and parcels of land* OR OTHER PROPERTY, described in the warrants." They also provide for giving notice of the intended application, the effect of the notice as service, that the report upon each warrant shall constitute a separate suit, and how the suit shall be entitled. That "the owner of any property described in said reports, or any person beneficially interested

therein, may appear at said court at the time designated in collector's notice and file objections in writing to the recovery of judgment against such property." That the court shall hear and determine the objections in a summary manner and prescribe the form of judgment to be rendered.

Gary Ord., pp. 88, 89 and 90.

POINTS AND ARGUMENTS FOR APPELLANT.

1. The appellee, under the Charter of the City of Chicago, has a full and complete remedy at law.

2. The property of the Railway Company assessed, is such property as can be legally assessed for the proposed improvement under the laws of the State of Illinois. The decision of the Supreme Court of Illinois is conclusive on this point.

3. No contract is shown by which the property of said Railway Company was exempted from special assessments that might be made by the City of Chicago.

4. The City of Chicago could make no valid contract, nor could the Legislature authorize it to make one, by which said Railway Company would be exempted from the payment of its portion for street improvements, in proportion to the benefits received.

5. The appellee has not shown in and by his said bill of

complaint, any right to invoke the aid of a court of equity in the premises.

6. The decision of the Supreme Court of this State upon the question of the power of the Legislature of the State to make a valid contract exempting a corporation from paying its portion of the expense for improving a street or highway, in proportion to benefits received, will be held of binding force.

7. A State, under the right of eminent domain, can authorize the improvement of its streets and highways, and the making of special assessments like the one in question, to pay for such improvements.

8. The decisions of the highest court of the State, in regard to the power of the State to exercise the right of eminent domain, as to the property of a corporation organized under the authority of such State, will be respected and followed by this court.

I.

It is insisted that complainant has a complete remedy at law.

The charter of the City of Chicago provides for the issuing of warrants to the collector for the collection of taxes and assessments, and makes it the duty of the collector, in case such taxes or assessments are not paid, to make report to some court of general jurisdiction, held in said city, of all taxes and assessments then remaining unpaid. That said collector shall give six days' notice, by advertisement in the corporation newspaper, of his intended application for judgment, &c. That "the said Court shall pronounce judgment against the several lots and

parcels of land *or other property* described in said reports, for which no objection shall be filed," and that "the owner of any property described in said reports, *or any person beneficially interested therein*, may appear at said Court, at the time designated in the collector's notice and file objections in writing to the recovery of any judgment against such property."

Gary's Laws and Ord., pp. 88 and 89, Sec. 15.

As the appellee was the owner of one hundred shares of the stock of said railway company he is certainly "beneficially interested" in the property of the company, and would be entitled, under said charter, to appear and file objections to the rendering of a judgment against the property of the company.

The Supreme Court of this State give a very broad construction to the language, "persons beneficially interested," and hold that it allows "all persons whose interests would be affected by a sale of the property to appear and contest the judgment," as will be seen by an examination of the following cases:

City of Chicago vs. *Rosenfield et al.*, 24 Ill., 495.

Canal Trust. vs. *The City of Chicago*, 12 Ill., 407.

It was the duty of the complainant to file his objections and resist the application for judgment in the first instance. Had the decision of the Court been in derogation of his rights he should have applied to the Supreme Court of this State for redress, and had the Supreme Court decided adversely to his interests he should have come to this Court by writ of error, as provided in section 25 of the judicial act. This Court would then have had the power to examine and revise or affirm the decision of the Supreme Court of Illinois, and the decision of this Court would have been final.

If the complainant had reason to fear—which he does not allege in his bill—that the officers of his company might pay this assessment before its legality could be determined by a court of law, that would not be a good and sufficient reason for his neglect to pursue his remedy at law, because upon a proper showing, a court of equity would have enjoined such officers against making such payment until a final decision of the case by a court of law.

II.

Is the property of the railway company assessed, such property as can be legally assessed for the proposed improvements under the laws of the State of Illinois.

These assessments were made under the provisions of the act of March 9th, 1867, amending the act of 1865, and the legislature, in directing *what* shall be assessed, use the terms "real estate," and "property."

By the act of 1867 the assessment is required to be made upon the "property" benefited.

In providing for the judgment, the charter requires that "the court shall pronounce judgment against the several lots and parcels of land and *other property* described in the collector's reports."

See *Gary's Laws and Ord.*, p. 89.

It is evident that the term real estate is not used in its confined and limited sense of "land" merely, but in the more comprehensive sense, embracing lands, tenements and hereditaments.

It was clearly the intention of the legislature that any property of a real nature, any interest in land, whether in fee, for life or for years, should be assessed for these improvements.

The statute of Illinois on judgments and executions, defines real estate to be "all interest of the defendant claimed by virtue of any deed, bond, covenant, or otherwise, for a conveyance of lands—in fee for life or for years."

Revised Stat., chap. 57, sec. 1

The statute on escheats uses the term real estate as embracing lands, tenements and hereditaments.

Revised Stat., chap. 38, secs. 3 & 4.

The court will take judicial notice of how a horse railway is conducted. It is built by laying down ties, plank, stringers and rails, so as not to obstruct the ordinary travel on the street, thus forming a structure imbedded in the soil, on or over which structure their cars are drawn by horse power.

It is especially adapted to the carriages of the company, and all persons are compelled to give way to such carriages.

6th sec. of Charter, Exhibit A.

The company has, in many respects, a monopoly of the tracks; the use of the tracks is not common alike to all, and although "persons may travel on the track of the road the same as upon other streets, yet they can not do so in the same manner, or for the same purpose for which it is used by the corporation."

Craig vs. *Rochester City & B. Railway Co.*, 39 Barb., 497.

These rights, franchises and interests of the company, it is alleged, were, by the act of February 6, 1865, extended for the term of 99 years.

In the case of the *Enfield Toll Bridge* vs. *N. H. Railway*, the court says: "What are the rights of the plaintiff? They are derived from the grant of the legislature, and are what are known in law as a franchise; and a franchise is an incorporeal hereditament, known as a species of property as well as any estate in land. It is property which may be bought and sold, and which will descend to heirs, and may be devised."

17 Conn., p. 40.

The right to use public land covered by water, or to overflow it so as to operate mills, was held to be an easement and interest in land which was taxable as real estate.

Boston Water River Co., vs. *City of Boston*, 9 Metc., 199.

The right of way, &c., of the Chesapeake and Ohio Canal held to be realty according to the common law.

Bland's Ch. Rep'ts, 145.

In the case of the *Providence Gas Co.*, vs. *Thurber, et al*, the Gas Co. had been assessed for their gas pipe laid in the streets, by grant of the city, upon the ground "that these pipes are fixtures, and therefore real estate in the sense of the act regulating the assessing and collecting of taxes." The court, in its opinion, says, "If the pipes in question are real estate, the assessment has been rightfully made;" if personal estate, the assessment is illegal. After reviewing the authorities as to what are fixtures, the court remarks, "What then is the nature

of the right which the plaintiffs take under their charter? We think when exercised, it is an easement, an incorporeal hereditament, like the right of a railroad company to build and occupy their road," &c., and as such, that it was liable to the assessment.

2 Rhode Island R., pp. 15 and 21.

The English authorities are equally strong upon the proposition that property like that of this railway company assessed, is real property, or an interest in realty subject to such assessment.

All freehold rents of every nature, held to come within the term "tenements" as used in the statute of Frauds and Perjuries.

Robs. on Frauds, 126–7.

Hubergray vs. *Vincent*, *2 Vesey*, p. 232.

In the case of Buckridge *v.* Ingram it was held that the shares in the navigation of the river Avon, under the statute of 10 Ann, were real estate and subject to dower, and should be devised with the same solemnities as a devise of real estate. The master of rolls, in same case, speaking of the definition of a hereditament given by Coke, says: "Anything which in any degree arises out of land, affects the same, or is exercisable within the same, has all the properties that belong to real estate." * * * "When we come to try the question of the text by that definition, it would be strange to say this right of making these cuts and erections, and receiving certain tolls payable by all persons and goods navigating that part of the river, does not savour of the realty; it not only does, but it partakes of it. It is not the soil, which I hold would hardly pass to the grantee, but it is a right arising out of the soil." * * * "Therefore this act cannot be construed to have taken out of the propri-

etors and given to the corporation the soil; *but it has given them a right in and over the soil, and certain real rights arising in and out of the soil.*"

Buckeridge vs. *Ingram*, 2 Vesey, pp. 652, 663.
See also
House vs. *Chapman*, 4 Ves., 42.
Finch vs. *Squire*, 10 Ves., 42.
5 Barn and C., 221.

In the case of *Rex* vs. *Brighton Gas Light Co.*, cited by the Supreme Court of Illinois, in the case of *City of Chicago* vs. *Baer*, the court says: "The company are empowered by an act of 58 G., 3, with the consent of the commissioners, for paving and lighting the town of Brighton, to break up the soil of the streets and roads, dig and sink trenches and lay pipes, and to alter the position of, and to repair and relay such pipes. If it were doubtful in this case whether the pipes constitute a part of the freehold, the company would at all events be liable to be rated for an occupation way; but I think that we may collect from the case that the pipes are fixed in the soil, and if so, *Rex* vs. *The Corporation of Bath*, 14 East., 609, establishes that they are to be deemed occupiers of the land in which the pipes are fixed. *Rex* vs. *Rochdale Water Works Company*, 1 M. & S., 634, and *Rex* vs. *The Birmingham Gas Light and Coke Company*, 1 B. & C., 506, establish the same principle. In the latter case, part of the apparatus used for the manufacture of gas and coke was affixed to the freehold and part was not, and it was held that the company were liable to be rated to the extent of their occupation of the land, *and that the branches and pipes were to be considered part and parcel of the land.*" * * * Upon these grounds I am of the opinion that this property is rateable.

Secondly, that it is *rateable to the extent of the value of that which for the time* constitutes a part of the freehold."

5 Barn & Cress., 470.

11 E. C. L., 545.

The decision of the Supreme Court in the case of the *City of Chicago* vs. *Baer*, 41 Ill., 306, that this same railway company, occupying a portion of the street with their track, and in use thereof, "under a charter and a contract with the city authorities, have a franchise and right of occupancy which is a property of a character to be substantially benefited by the paving of such street, and which must be assessed for these improvements," will be adopted by this Court.

In *Jackson* vs. *Chew*, 12 Wheat. 162, this Court say: "The inquiry is very much narrowed by applying the rule which has uniformly governed this Court, that where any principle of law establishing a rule of real property has been settled in the State courts, the same rule will be applied by this Court that would be applied by the State tribunals." See also

Suydam vs. *Williamson*, 24 How., 427.
Thatcher et al. vs. *Powell et al.*, 6 Wheat., 119.
Nesmith vs. *Sheldon et al.*, 7 How., 812.
Bank of Haml. vs. *Lessee of Dudley*, 2 Pet., 492.
McCutchen v. *Marshall*, 8 Pet., 220.
Polk's Lessee vs. *Wendell*, 9 Cranch, 97.
Elmendorf vs. *Taylor*, 10 Wheat., 152.

III.

No contract is shown which exempts the property of the railway company from assessments for street improvements.

The exemption is claimed to exist by virtue of sec. 7 of the ordinance of said city authorizing the construction and operation of the horse railway company, which is as follows: "The said company shall, as respects the grading, paving, macadamizing, filling or planking of the streets or parts of streets, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railways on all streets whereon one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, *in good repair and condition* during all the time to which the privileges hereby granted to said company shall extend, *in accordance with whatever order or regulation respecting the ordinary repairs* thereof may be passed or adopted by the Common Council of said city." * * *

It will scarcely be contended that there is contained in said section any express exemption from assessments. It does not read that "said railway company is hereby exempted from all assessments for street improvements," or that "no assessment for street improvements shall be imposed upon said company;" nor is it probable that the city would have consented to release the company from paying its just portion of the cost of such improvement without some other consideration than is expressed or implied in the ordinance.

It is submitted that in the construction of this alleged contract, the benefit of any doubt will be given to the public and that the contract will be construed most strongly against the railway company.

It is not possible to improve a street upon which the track is laid without improving that portion upon which the track is laid,

and the "order and condition" in which the whole street shall be is a matter to be determined by the city. It may well be contended that the obligation to keep a certain part of the street in "good order and condition" would require the company to pay its portion of the cost of a new pavement. The agreement is not to keep *the part of the street where the track is laid* in "good order and condition," but to keep eight feet in width where there is one, and twice as much where there are two tracks. The word "repair" must be construed as synonomous with "improvement," and the section as providing for an exemption (if there is any exemption,) from any unusual, uncommon or extraordinary repair or improvement.

The exemption claimed must be an *express exemption*, and it will not be *assumed or inferred* that it does exist.

In regard to the taxing power Chief Justice Marshall says, "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it can not be necessary to affirm. It would seem that the relinquishment of such a power is never to be assumed."

Providence Bank vs. *Billings, et al.*, 4 Peters, 561.

"These exemptions, as they are contrary to common rights, are not to be favored by the court. * * In short the statute which exempts persons or property from taxation *is to be construed strictly.*"

Orr vs. *Baker*, 4 Ind., 86.

Common Council vs. *McLean*, 8 Ind., 331.

The abandonment of the power of taxation, the whole community have a right to insist, "shall not be presumed in any

case unless the deliberate purpose of the State to abandon it expressly appears."

Hamna vs. *Board of Commissioners*, 8 Blackford, 355.

Providence Bank vs. *Billings, et al.*, 4 Peters, 561.

Also in the last cited case, "Any privileges which may exempt it (the corporation) from burthens common to all individuals, do not flow necessarily from the charter, *but must be expressed in it or they do not exist.*" And again in the same case, "*We must look for the exemption in the language of the instruments, and if we do not find it there, it would be going very far to insert it by construction.*"

The case of *The Mayor, &c., of Baltimore* vs. *The Proprietors of Green Mount Cemetery*, is a case very much in point:

The authorities of that city made an assessment to pave York avenue, and among other property assessed *Green Mount Cemetery*.

The proprietors claimed exemption because *their* charter provided that a certain number of acres of land "shall be *forever* appropriated and set apart as a cemetery, which, so long as used as such, *shall not be liable to any tax or* PUBLIC IMPOSITION WHATEVER."

And the court say: "The words, 'any tax or public imposition whatever,' most certainly are very comprehensive, and would, if strictly construed, apply to every possible form of taxation or imposition, and, as a consequence, necessarily include a paving tax. But, on the fullest consideration we are unable to satisfy our minds that the statute in question should

receive such an exposition. We think the legislature intended nothing more than to exempt the property of the proprietors from all taxes or impositions levied or imposed for the purpose of revenue, *and not to relieve it from such charges as are inseparably incident to its location in regard to other property.*"

* * * * * * *

The property of the United States, of the city and county of Baltimore, are all exempted from taxes, and yet it has never, so far as we are informed, been contended that it was not liable for the paving done in front of it, and we can see no reason why that of the appellees should be. If the latter be not responsible, then it is evident, the street must remain forever unpaved, or the expense of it be wholly and entirely borne by the proprietors of the lots opposite. Surely this never could have been the intention of the legislature, nor can it be imagined it was the purpose to compel the city *generally* to do it. It must be viewed *practically* as a *benefit* conferred on the property of the appellees, and the mere fact that they were *indifferent* to it, ought not to avail in their favor any more than the like indifference of an individual proprietor would shield him from liability to pay his quota when the paving is done in front of his ground."

7 Md., 533, 536.

"A relinquishment of the right of taxation is not to be presumed unless expressed in terms too plain to be mistaken."

Philadelphia & Washington R. R. Co., vs. *Maryland*, 10 How., 376.

Jefferson Branch Bank vs. *Skelly*, 1 Bl., 436.

Gilman vs. *Sheboygan*, 2 Bl., 510.

Inasmuch as there is not in this section 7 any express "exemption," it follows from an application of the rules laid down in the decisions cited, that no such exemption will be "inferred" or "presumed."

Why should any such exemption be presumed? These assessments for benefits are not taxes; they are not burthens; but only an equivalent for the increased value the property assessed derives from the improvement.

The Supreme Court of Illinois, in the case of *Canal Trustees* vs. *City of Chicago*, decided as far back as the year A. D. 1850, held that these special assessments "have none of the distinctive features of a tax," that "the assessment is precisely in the ratio of the advantages accruing to the property in consequence of the improvement. It is but an equivalent or compensation for the increased value the property derives from the opening of the street."

12th Illinois, 406.

In the case of *The City of Chicago* vs. *Larned*, the same court announces that the principle laid down in the case last cited has been adhered to in all the cases decided by that court: that special assessments are not "taxes," and are not "burdens when laid in the ratio of benefits;" that "the equation of benefits and burden formed the groundwork of all of them."

If then these assessments are not taxes or burdens, what is there to be exempted from? By the assessment the company receives a benefit and pays for what it receives. The company is not required to pay beyond the benefits received; its "proportion of benefits" may be and is usually much less than the actual benefit. The proposition that it is "exempt" amounts

simply to this: That "the contract" requires that when an improvement is made and the property of the company is enhanced in value, the city and private property shall pay all the cost of the improvement; that the money and property of individuals and of the municipal incorporation shall be taken and given to the company. *The claim then is not of "an exemption" from "burdens," from "taxation," but that private property—money—shall be taken and applied to the enhancement in value of the private property of the railway company.*

IV.

The appellee has not shown in and by his bill of complaint, any right to invoke the aid of a Court of Equity in the premises.

First. It does not appear from the bill of complaint that at the time of the rendering of the decision by the Supreme Court of Illinois, in the case of *The City of Chicago* vs. *Baer*, 41 Ills., 306, (the opinion in which case is made a part of the bill of complaint) the appellee was a stockholder or had any interest in the North Chicago City Railway Company.

The bill of complaint was filed on the 20th January, A. D. 1869, and it is averred therein that the appellee "is and has been for more than a year last past, a stockholder," &c. This allegation is admitted by the demurrer; and it will become necessary for this court to place a construction on the language "more than a year," in order to determine the extent of the admission, and as pleas are construed most strongly against the pleader, this language must be held to mean the shortest possible time consistent therewith. One year and one day being

"more than a year," the allegation cannot be construed to mean (nor the demurrer to admit) that the appellee had been a stockholder in said company for a longer period than one year and one day prior to the date of the *jurat*, which was subscribed to on the 19th January, 1869.

The decision in said case in the forty-first of Illinois Reports was made at the September term, A. D. 1866, more than two years prior to the filing of the bill in this cause, and more than one year prior to the date when appellee became a stockholder in said company (if I construe the language of his bill correctly). If, as alleged in the bill of complaint, said decision "was the making of a law by a state impairing the obligations of a contract," (which I do not admit), yet, to entitle the appellee to relief in this court, he should have shown by a direct and positive averment, that he was a party to and interested in this "contract" *at the time when its obligations were impaired;* for if he was not then a stockholder his rights were in no wise affected by said decision. It is unnecessary to inquire as to what relief, if any, the railway company (if suing as a corporate body) would be entitled; it is certainly clear that no individual stockholder, who became such after said decision was made and published to the world, can question the legality of said decision, and this court, in the absence of any averment showing that fact, will not *presume* that the appellee was a stockholder when said decision was made.

Second. It does not appear in or by said bill of complaint that the appellee's interests as a stockholder in said company were likely to be affected injuriously.

It is averred in the bill that appellee, on the 11th January,

1869, presented a communication to the board of directors of said company, requesting them to take steps to prevent the collection of the said assessments, and that said board, by a majority vote declined to take any steps in the matter. (Exhibit D to the bill of complaint shows a copy of his communication and the resolution of the board of directors.)

It is also averred that the "payment of said illegal assessments, or any part thereof," by said board of directors, "will be a waste of the funds of said company, without any equivalent or valid consideration."

We look in vain for any allegation that said directors "were about to pay;" or that "unless enjoined they would pay;" or that complainant "feared or had reason to fear that said directors would pay;" or that said directors "had threatened to pay" said "illegal assessments." The only allegation upon which he relies to obtain an injunction is that he "fears that the city of Chicago, through the said collector, (Heald,) will collect the same unless restrained by a court of competent jurisdiction."

It is true that the city collector had warrants for the collection of these special assessments, but it is also true that under the law he could do nothing but *demand payment* until he had given the notice required by law that he should apply for judgments on such as were unpaid, and judgments had been rendered by some court of general jurisdiction, sitting in Chicago; and it does not appear that such notice had been given, or that he had applied to a court for judgment. That appellee had reason to believe that the city of Chicago, at some time, near or remote, would endeavor to enforce the payment of these assessments in the manner prescribed by law is probably true, but I do not

think his bill discloses *facts* or *fears* sufficient to entitle him to an injunction *at the time* of the filing of his bill.

The board of directors of the company might and unquestionably would, when judgment was asked on these assessments, have filed objections and resisted the application for judgment. Their resolution of January 11th, would not have precluded them from doing this, and had they believed the assessments to be illegal, it would have been their duty to do so. It is to be presumed that they would have discharged their duty, more especially as the appellee has not alleged that they had neglected or refused, or that he believed or had reason to believe that they would neglect or refuse to protect the interests of the company. There is not in the bill an allegation or insinuation of bad faith on the part of the directors of the company, nor of neglect or refusal on their part to discharge their duties, aside from the resolution of January 11th. All such allegations are carefully avoided, and for no other reason, probably, than that the appellee did not believe them to be true.

I am forced to the conclusion that the action of the board of directors in "declining to resist the collection of the special assessment," was for the express purpose of enabling the appellee to file this his bill of complaint. I will refer the court to the case of *Dodge* vs. *Woolsey*, 18 How., 331, and particularly to the averments in the bill of complaint therein recited, for my views as to what averments the bill in this case should have contained.

There is no allegation of *fraud* or bad faith on the part of any of the defendants named in the bill of complaint.

V.

The alleged contract so far as it may be construed to exempt the railway company from special assessments is not a valid contract.

The City of Chicago could make no contract, nor could the legislature authorize it to make one, by which the company would be exempted from the payment of its portion for street improvements, in proportion to the benefits received.

It is contended upon the part of appellee, that the contract made by said section seven, is a contract between the state and the railway company, and that the city was the mere agent of the state in the making of the contract.

The second section of "the act to promote the construction of horse railways in the City of Chicago," exhibit A, provides that the company may operate, etc., a single or double track railway, * * upon such streets, * * as the common council have * or may authorize said corporation so to do, upon such terms and conditions, and with such rights and privileges as the said common council might, *by contract*, with said parties, (the corporators), prescribe. This clearly contemplates a contract between the company and the City of Chicago.

The City of Chicago contracting under this act of the legislature, it is contended by appellee, has exempted the company from the payment of assessment.

The city, by the ordinance, did not attempt to act as the agent of the state, but only for the city as principal, and

required bond to be given to the city—not the state, for the faithful performance, by the company, of all the terms and conditions of the ordinance. Exhibit B.

The city is not, by the act, authorized to exempt said company from any future liability for taxes or assessments. It might as well be contended that the city could have exempted said company from liability to pay state taxes.

If the contract is one of exemption, it is only a contract between the city and the company, that the company should not be required to pay its proportion of the cost of special assessments.

Such a contract the city could not make; the act of the legislature incorporating the company did not authorize, neither was there any authority in the charter of the city to contract for such an exemption.

The city had no right to contract that it would pay out of its own treasury for any benefits that might accrue to the property of this company by the improvement of the streets upon which its railway should be laid, nor could it agree that the company should not pay for such benefits. It would be virtually an agreement on the part of the city that the public moneys should be applied to private uses—in other words, to the enhancement in value of private property.

But it will be contended that the State ratified, by the act of the legislature of February 6th, 1864, commonly called the 99 year extension act, (Ex. C,) the contract made by the city ordinance.

An examination of this act will show that it will bear no such construction, and as the Supreme Court of Illinois say in the Baer case, it nowhere appears that the city has extended the term for occupying the streets.

Under what power are these special assessments made, is a question lying at the very foundation of the enquiry as to the validity of this contract; whether the contract is viewed as a legislative contract or as a contract between the city and the company.

This question has been very elaborately considered by the Supreme Court in the Larned case, 34 Illinois, p. 203.

In that case a special assessment had been levied under the provisions of the then charter of the city, which required the cost of such improvement of streets to be levied upon the property abutting, according to its frontage and without regard to its depth. It was contended that this charter was unconstitutional, because if the assessment was levied under the "taxing power," there was not the "equality" and "uniformity" of taxation required by the state constitution.

If under the exercise of the power of "eminent domain," then, that there was no "just compensation" provided for as required by the constitution; that there was no compensation provided for in the City Charter, either in money or by assessment of benefits.

The court says—"Regarded in the light of a tax, then it—"the assessment—is wholy indefensible. But the plaintiff in "error—the City of Chicago—hope to escape this conclusion "under the guise that it is a 'special assessment' and not a tax.

"Call it a special assessment, then it is demanded on what "ground, apart from the taxing power, can property be taken "by way of a local or special assessment? As we understand "it, the property of a citizen can be divested only in one of four "ways: 1. For taxes. 2. For public uses by right of eminent "domain. 3. As a penalty for disobedience to or infraction of "some public law. And 4. To enforce payment of his debts. If, "then, a special assessment was not a tax it must be placed where "the defendants in error place it, under the exercise of the power "of eminent domain. *The first mode being ignored by this court,* "*as a basis of these assessments, they must of necessity be held to* "*come under the right of eminent domain. They can not be re-*"*ferred to any other constitutional provision. Power of every* "*description must be referred to some certain source—some 'lo-*"*cal habitation' must be assigned to it, and if none can be, then,* "*it is safe to say it is a 'vagrant power,' or that it has no exis-*"*tence. How can this right of eminent domain be exercised?* "*Only under the constitution by making just compensation.*" * * "*It has been decided by this court * * that this compensation may* "*be either in money or benefits. It is solely on this ground that* "*such assessments have been sustained by this and other courts.*"

The City of Chicago vs. *Larned*, 34 Illinois, p. 276.

This is the construction of our state constitution as given by its highest judicial tribunal; it is that the power to make special assessments exists, in the state of Illinois only by right of eminent domain.

The only manner that a street or road can be improved by special assessment in the State of Illinois, is by the exercise—by the state, or by its authority—of the right of eminent domain.

Could the city of Chicago, under the power conferred by the act of incorporation of the railway company, agree that this right of eminent domain should not be exercised by the state or by its authority, or that the property of this railway company should be exempt from the exercise—by the state—of this right of eminent domain? It certainly could not. Could the city surrender this right of eminent domain—this part of the sovereign power, to the company, so far as its property was concerned? Yet in order that the company's property should be exempt from these special assessments, it must be shown that this right of eminent domain has been surrendered so far as that property is concerned.

The city could not agree that this power should not be exercised, nor that if it was exercised the city would pay for the property of the railway company that should be taken under the exercise of that power.

All property in the state, that of individuals, and of this company, as well as its franchises, are held subject to the exercise of this right of eminent domain.

Chesapeake & Ohio Canal Co. vs. *Kerg*, 3 Cranch. C. C. R., 599.

Baltimore & Ohio R. R. Co. vs. *Van Ness*, 4 Cranch. C. C. R., 595.

Richmond F. & P. R. R. Co. vs. *Louisa R. R. Co.*, 13 How., 71.

But it will be contended that our Supreme Court are in error, that the power to collect money from property to pay for these improvements cannot be referred to the power of eminent domain.

The taking of land for a street or a road, it will be conceded, is an exercise of the right of eminent domain; and that such taking may be *compensated by benefits to* adjacent land. Why then, can not the money taken for street improvements be so compensated?

"In order to exercise the right of eminent domain it is not necessary to take the fee of the land to take it wholly, but an interest in the land, or less than the whole may be taken.

In the exercise of this right the legislature are the exclusive judges of the degree and quality of interest which are proper to be taken, as well as of the necessity of taking it."

De Varaigne vs. *Fox*, 2 Bl. C. C., 95.

Any act of the legislature of the state which should authorize the taking of the money or property of an individual, a city or other corporation, for the purpose of paying for the increased value conferred upon another person's or another corporation's land or property by improvements of this class, *would be a taking of private property for private uses.*

It will not be asserted that this can be done, and yet this is the result of the so-called exemption claimed for this company.

How can these street improvements be made under the exercise of the right of eminent domain if a portion of the property benefited is exempted from its liability to be taken therefor?

The property of the city corporation, the property of individuals, and the property of any company benefited is taken and compensation made for such taking by the benefits conferred.

Omit a part and the remainder is assessed unjustly to the extent of that portion which in the ratio of benefits should have been assessed against the part so omitted; in other words, the remainder is required to contribute so much money more than its portion of the expense of the improvement than it justly should do to enhance in value the property so omitted. This would be not the taking of private property for *public use*, but, under plea of eminent domain, the taking of private property for the private use of the part so omitted.

Suppose the part omitted was so large that in order make the improvement, the remainder of the property to be assessed would have to be assessed to an amount beyond the enhanced value or benefits it would receive by the improvement, then there would be no *compensation* for such excess; the effect of this would be to prevent any such local improvement in the city, or to require the public funds of the city corporation, taken for such excess, and applied to the enhancement in value of the part so omitted, *i. e.* to be applied to private uses.

But it is contended by appellee that inasmuch as the State may commute and waive taxes for a proper consideration, that it follows that special assessments may be commuted the same as taxes.

It is submitted that there is a distinction between a tax and an assessment for benefits. A tax is a burden—imposed as such—and without reference to the individual benefit of the person upon whom it is laid.

The true principle of taxation is necessity of the government.

But in the case of special assessments there is absolutely no burden, and the Supreme Court of Illinois, in the Larned case, in reviewing the cases decided in Illinois, hold this to be true. The court says, that as the assessments are in the ratio of advantages or benefits they are lawful; that they are an equivalent for the increased value the property derives from the improvement.

In the case of the tax, no direct immediate benefit is conferred; the government takes from the individual for purposes of revenue, for its necessities, but in the case of a special assessment, the compensation is direct, immediate to the individual paying the assessment. His property is enhanced in value to an amount equivalent to the assessment upon his land. Is there this direct immediate enhancement in value of the property to an amount equivalent to the tax paid?

How can that which is a benefit be commuted? You may *commute* a burden—but you cannot commute a benefit. If this power to make special assessments is an exercise of the right of eminent domain, then this right of eminent domain is what is commuted.

If the contract is one between the city and railway company, then the city has undertaken to commute—*i. e.* to agree that the right of eminent domain shall not be exercised. If it is a legislative contract, then the state has undertaken to commute—*i. e.* to agree that it will not, when the public necessities require, exercise the right of eminent domain.

The right of eminent domain is not the subject matter of contract.

Brewster vs. *Hough*, 10 New Hamp., 147.

Does not this so called "commutation" result simply in taking private property for private uses. To do this would be unconstitutional.

Neither the city nor the legislature could make a valid contract by which the private property of individuals or of the city could be taken to enhance the value of the property of this company.

VI.

The appellee has, in his bill, made certain allegations relative to the expenses which will be incurred by the railway company, by reason of the improvement, for the purpose of showing that this improvement is of no benefit to the company.

The bill makes no allegation that the assessment is so excessive as to amount to an abuse of power, and raise the presumption of fraud.

The charter provides for the giving of six days' notice by the commissioners of the time and place of meeting to make the assessment, and *that all persons interested in any such assessment* shall have the right to be present and heard, either in person or by counsel, and that the commissioners may receive evidence.

Sec. 23, chap 7, *Gary's Laws and Ord.*

The subsequent confirmation is conclusive.

Sec. 24, and chap. 7.

The company and the complainant, having had an opportunity to be heard, and not having taken advantage of it, cannot complain that the assessment is excessive.

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The company and the complainant, having had an opportunity to be heard, and not having taken advantage of it, cannot complain that the assessment is excessive.

This court will not review the question as to whether this assessment is too much or too little.

City vs. *Burtice*, 24 Ills., 491.
Burnham vs. *City*, 24 Ills., 499.
Leroy vs. *Mayor, &c.*, New York, 20 John, 430.

Under the laws of Illinois, the fee of all the streets is in the City of Chicago. These assessment proceedings are *in rem*, no personal responsibility attaches to the owner of the property assessed. If the assessment proceedings are void, no title passes to the purchaser under the collector's sale. He, the collector, has no power to distrain on personal property for the amount assessed. It is respectfully submitted that this court, under the circumstances, will not justify the interfering with the proceeding of the city in the making of its improvements in the manner that appellee has attempted in this case.

VII.

Was the decision of the Supreme Court of Illinois in the case of *The City of Chicago* vs. *Baer*, "*the making of a law by a state impairing the obligations of a contract?*"

Some of the propositions established by the Baer case are:

1. It must be important to the railway company to have a smooth and durable road-bed.

2. The decision in the *Larned* case, 34 Ills., re-affirmed.

3. That the constitutional provision concerning uniformity applies as well to special assessments as to taxation.

4. That the constitution of Illinois requires *all* property benefited to be assessed.

5. That to exempt any property benefited would be a violation of the constitution of this state.

6. The right to make special assessments under our constitution referred "to the right of eminent domain."

7. That assessments must be made in the ratio of advantages or benefits, which must be *equally* imposed on all property benefited.

8. That no special assessment can be sustained under our constitution, which imposes *all* the costs upon a *portion* of the property benefited.

9. That if the ordinance in controversy, which it was claimed exempted the railway property from assessment, was really passed, "*so far as it seeks to exempt the railway company from paying for its portion of street improvements in proportion to the benefits received, is unconstitutional and void.*"

10. That the common council could make no such contract, and that the legislature could not authorize it to do so.

11. That the property of the company is of a character to be substantially and directly benefited by the proposed improvement, and that in proportion as it is benefited it should contribute its share to the cost of improvement.

It will not be claimed that the provisions of the constitution of this state, or any law of this state which are construed or

passed upon in the foregoing case, are in conflict with the constitution of the United States, or with any law of Congress.

It is the province of the highest court of a state to interpret the constitution and laws of such state, and after a careful examination of authorities, I have been unable to find one which sustains the views of appellee's solicitor, that such *interpretation* is "the making of a law by a state," within the meaning of that clause of the constitution of the United States which forbids the making of laws imparing the obligations of a contract; nor does the solicitor for appellee cite a single authority in support of his position. The case of *Jefferson Branch Bank* vs. *Skelley, 1 Black*, is not a case in point.

I do not contend that the constitution of the United States and the laws made thereunder are not to be strictly followed and observed, but I do insist that where neither the constitution nor laws of the United States are called in question the highest court of a state is the proper exponent of the constitution and laws of such state, and that this court will not review its decisions except upon writ of error in the very case wherein such decision was made.

As the Supreme Court of Illinois had jurisdiction of the parties and had power to decide the subject matter in controversy in said suit of the City of Chicago *v.* Baer, I insist that said decision is final and conclusive, as it does not come before this court on writ of error, as required by the 25th section of the judiciary act.

"It is the established doctrine of this court that it will adopt and follow the decisions of the state court in the *construction of*

their own constitution and statutes, when that construction has been settled by the decisions of its highest judicial tribunal.

Nesmith vs. *Sheldon et al.*, 7 Howard, 812, 818.

In this case a stipulation was made to submit [redacted] upon the 7th January, which stipulation was made by my predecessor in office. I did not succeed him until the latter part of December, and therefore was forced to prepare this brief upon a subject comparatively new, within a very limited time. I, therefore, hope that your Honors will take the above fact as an apology for this, somewhat crude and imperfect, brief.

M. F. TULEY,

Corporation Counsel.

IN THE

Supreme Court of the United States,

December Term, A. D. 1869.

THE CITY OF CHICAGO,

—VS.—

WILLIAM C. SHELDON.

Appeal from the Circuit Court
—FOR THE—
Northern District of Illinois.

STATEMENT, POINTS and ARGUMENT,

FOR APPELLEE.

W. C. GOUDY, ATTORNEY FOR APPELLEE.

Beach & Barnard, Steam Print, 122 & 124 S. Clark St.

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Statement, Points and Argument, for Appellee.

STATEMENT OF THE CASE.

May it please your Honors:

The appellee, William C. Sheldon, filed a bill in chancery in the court below against the appellant, The City of Chicago and its Collector, and John B. Turner, Volentine C. Turner, George F. Rumsey and Jacob Rhem, who were directors of the North Chicago City Railway Company. An amendment was subsequently filed.

A demurrer to the bill as amended was filed by the appellant and the City Collector, which was overruled by the court. The other defendants failing to appear and the parties demurring to answer further, a final decree was

entered in accordance with the prayer of the bill, from which the city of Chicago appealed.

The object of the proceeding was to prevent the collection and payment of special assessments for grading and paving certain streets.

The bill avers that an act was passed by the Legislature of the State of Illinois, February 14, 1859, by which a corporation was created, under the name of the North Chicago City Railway Company, with power to construct and operate a railway in the north division of the city of Chicago, in such streets as the common council might authorise, "and in such manner, and upon such terms and "conditions, and with such rights and privileges," as the common council might by contract prescribe.

This act was more than an ordinary act of incorporation. It conferred certain powers upon the common council of the city, and authorised a contract to be made, which should be binding upon the State on one side and the Railway company on the other.

The contract was consumated by the passage of an ordinance by the common council, on the 23d day of May, 1859, and its acceptance by the Railway Company on the 9th day of June, 1859. The terms of the contract can be ascertained by reference to this ordinance, which is an exhibit to the bill. (Printed record page 7.)

The Railway Company was authorized to lay tracks in certain streets, among which are North Clark and Division streets, the cars were to be propelled by animal power, and to be used to transport passengers and their ordinary luggage only ; the common council was to regulate time

and speed ; the tracks were not to be elevated above the surface of the streets, and to be laid with improved rails so that vehicles could freely cross the tracks, and the rates of fare for any distance within the city limits were not to exceed five cents. The tracks were to be constructed within certain periods of time specified in the ordinance, and the rights and privileges were to continue for twenty-five years. The Railway Company was required to enter into bond for the faithful performance of the terms and conditions of the ordinance. The only other provisions of the contract are contained in section seven of the ordinance, which reads as follows, to wit :

" The said company shall, as respects the grading, " paving, macadamizing, filling, or planking of the " streets, or parts of streets, upon which they shall " construct the said railways, or any of them, keep " eight feet in width along the line of said railway, on " all streets whereon one track is constructed, and " sixteen feet in width along the line of said railway " where two tracks are constructed, in good repair and " condition during all the time to which the privileges " hereby granted to said company shall extend, in ac- " cordance with whatever order or regulation respect- " ing the ordinary repairs thereof may be passed or " adopted by the common council of said city. And " the said company shall be liable for all legal conse- " quential damages which may be sustained by any

" person, by reason of the carelessness, negligence, or " misconduct of any of the agents or servants of the " said company, in the course of their employment, in " the construction or use of the railways aforesaid, or " any or either of them."

The Bill avers " that by means of said ordinance and " its acceptance by the corporation as aforesaid, under the " power and authority conferred by the State of Illinois, up- " on the common council of the city of Chicago, a contract " was made and entered into by and between the State " and said corporation with the terms and conditions fixed " in said act of incorporation, and said ordinance passed " thereunder, *and in and by said contract, the said company* " *were to be exempt from all special assessments to pay for* " *filling, curbing, grading, paving, macadamizing, or plank-* " *ing any street or parts of streets occupied by its tracks,* " and were bound to keep eight feet in width along the " line of said railways where a single track was laid, and " sixteen feet in width where a double track was laid, in " good repair and condition, in accordance with whatever " order or regulation with respect to the *ordinary repairs* " thereof might be passed or adopted by the common " council, and were liable for the legal and consequential " damages arising from the carelessness, negligence or " misconduct of the agents or servants of the corpora- " tion."

The bill further avers that the company executed the required bond, and constructed and operated the several lines in accordance with the terms of the ordinance, and in so doing invested $400,000, upon the faith that the contract was valid and binding in all its parts, and would be

faithfully observed by the State of Illinois and the city of Chicago; and that the company constructed a double track railway on North Clark Street and Division Street, and that it had operated the same for several years, and had, during all that time, kept in good repair and condition the parts of such streets required by the contract.

The bill further avers, "that the City of Chicago, "its common council, and all its officers, and said com- "pany, at all times prior to 1866 or 1867, understood "and construed the said contract to exempt the said "company from all liability to assessment for the "filling, grading, planking, macadamizing or paving "any streets or parts of streets in said city; and no "such assessment, or claim of right to make one, was "made prior to the time mentioned; and upon the "faith of such construction and understanding, as "well as by the express terms of the contract, the "said company constructed the railways last named, "and invested a large sum of money, and also ob- "served and performed the contract in every re- "spect."

For the purpose of showing the construction by the Common Council, the amendment to the bill sets forth an ordinance, passed August 20, 1864, by which additional streets are designated, and the permission granted is declared to be subject to all the restrictions and conditions,

rights and privileges, mentioned in the ordinance of May 23, 1859, except as otherwise therein provided. One of the main provisions is found in the fifth section, (*Printed Record*, 18,) where the company is compelled to keep certain parts of the streets occupied in good repair, substantially as required by the ordinance of May 23, 1859; and then requires, in addition, that when *any new improvement, paving or repaving, planking or replanking*, is ordered by the common council, the Railway Company should, in the same manner, and with like material, as required of the owners of property, as to other parts of the street, make such *new* improvements, on eight feet where a single track is used, or sixteen feet where a double track is used; and in case of a failure, the city should make the improvement, and the cost thereof was to be assessed on the company, and collected as other assessments. And it was further provided, that if the company should neglect to make the repairs required by that ordinance, or *the repairs required by any ordinance theretofore passed*, the city might make them, and collect the cost thereof by suit at law in any court of competent jurisdiction.

The bill avers that the contract was ratified by an act of the Legislature, passed February 6, 1865, which is made an exhibit.

The bill avers, that in 1865, the Board of Public Works, being duly authorized, made an assessment for filling and paving a part of North Clark street, occupied by the tracks of the Railway Company; and, following the uniform course theretofore pursued, neither the company nor its property was assessed; and afterwards application was made by the City Collector for judgment against some of the property assessed, and objection was made by a part of the

owners, for several reasons, and among others, because no assessment had been made against said Railway Company or its property for benefits. This objection was sustained, and the city appealed to the Supreme Court of the State.

At the September Term, 1866, the Supreme Court affirmed the judgment, holding that the company was liable to be assessed for such improvements, for reasons given in the opinion of the court, reported in the case of *The City of Chicago* v. *Baer et al.*, 41 Ill. 306, which is made a part of the bill. A full copy of this opinion is attached to this argument.

By reference to the opinion in *Chicago* v. *Baer et al.*, it will be seen that the Supreme Court of Illinois assumed that section 7 of the ordinance of May 23, 1859, by its terms exempted the Railway Company and its property from assessments for benefits, for the filling and paving of the street, yet held such stipulation in the contract to be void, because it was supposed to be in conflict with the provisions of the State Constitution requiring all taxes to be uniform. The court did not find any express inhibition or restriction in the Constitution, touching the question, but the provisions in regard to the rule by which taxes were to be levied, was construed to apply to assessments for benefits in making public improvements.

The question as to the power of the Legislature to commute such assessments, was not mooted or decided.

The bill avers that such decision of the Supreme Court of the State of Illinois, an appellate court of final resort, *was the making of a law by a State impairing the obligation of a contract*, contrary to the provisions of the Constitution of the United States, and inconsistent with the law as declared by the same court, at the time said contract was made and entered into.

The bill avers that the Board of Public Works of the City of Chicago, being the officers charged by the charter of the city with the duty of making special assessments upon the real estate by them deemed benefited by any proposed improvement, *claiming by virtue of, and under color of said decision of the Supreme Court*, that said company or its property was liable to be assessed for new improvements in the streets occupied by said company, did, in 1868, make several special assessments against "the "right of way, or easement, superstructure, tracks, turn-"outs, switches, and all interest of the North Chicago "City Railway Company in the parts of the several streets "proposed to be improved, for the distance occupied by "the said company;" that such assessments were reported to the common council, when they were confirmed without lawful right, and warrants for the collection thereof were issued, and placed in the hands of A. H. Heald, the City Collector, who was endeavoring to collect the same.

The bill sets forth a description of the several assessments, from which it appears that they were made

for curbing with curb stone, grading, and paving with wooden block pavement, North Clark and Division Streets, that the amount assessed for the whole improvement was $160,333 73, of which the sum of $28,676 94 was assessed against the property of the Railway Company.

The amendment to the bill avers that the entire value of the property of the company assessed was not more than $75,000; and the value of the entire superstructure in the parts of the streets described is not of a greater value than $40,000.

It further avers that by reason of an ordinance requiring the rail to be changed to a new pattern whenever a street is paved, the company is compelled to take up and throw away the materials composing the road bed and iron rails, and to re-lay the same with new materials at a cost of $40,000; and the value of the property of the Railway Company will not be increased by such new pavement.

It thus appears that the proposed improvement of these streets will compel the Railway Company to lose $40,000 for the old track taken up and thrown away, to expend for new tracks and in payment of the as-

sessment, $68,676 94, while the property of the company on these streets, including the franchise, right of way, and a proper proportion of the cars, horses, etc., does not exceed $75,000, making an expense of $108,676 94; and when the pavement shall be completed, the same property is not increased in value. The result is a damage of $33,676 94, without compensation.

If the assessment is to be considered as being made on the road bed alone, the company is compelled to expend $68,676 94 upon property of the volue of only $40,000, which is not increased in value by the new pavement.

The bill avers that there is no appeal, writ of error, or *certiorari* allowed from the order of the common council, confirming the assessment.

The bill further avers that none of said assessments or any part thereof were made for keeping the streets in good repair or condition, but no pavement had ever been made therein, and such assessments were made for the first paving thereof.

The bill further avers "that the property of said "company, described in said several assessment rolls "and assessed, is and was not real estate, and there-"fore was not liable to assessment, and there was no

"law of the State of Illinois authorizing the assess-
"ments to be made on any kind of property other
"than real estate."

The bill charges that said assessments are in violation of the contract made as aforesaid, between the State of Illinois, through the common council, and the Railway Company, and impair the obligation of a contract contrary to the Constitution of the United States.

The bill avers that the complainant is a stockholder, the owner of one hundred shares of $100 each, in the North Chicago City Railway Company; that Volentine C. Turner, George F. Rumsey, John B. Turner, Jacob Rhem and William C. Goudy were the directors of the company; and on January 11th, 1869, the complainant requested the board of directors to take steps to prevent the collection of such illegal and void assessments, and thereupon the board of directors passed a resolution declining to take any action in the premises, leaving the stockholders to seek such remedy as they may desire.

The bill charges that the payment of the sums so assessed will be a waste of the funds of the company.

The bill prays for an injunction to prevent the city of Chicago and its Collector from collecting these assessments, and the directors of the railway company from paying them.

The demurrer of the city of Chicago, and Heald, the city collector, admits the statements and averments of the bill, but claims that the complainant is not entitled to relief, because there is an adequate remedy at law, and

there is nothing alleged in the bill whereon the court can give relief.

The court below overruled the demurrer and rendered a final decree, and this decision is the only question now before the court for review.

Law Points.

1. The property of the railway company assessed is not such property as can be assessed for the proposed improvements under the laws of the state of Illinois.

2. These assessments are such a gross abuse of power that they are fraudulent and void.

3. The railway company and its property is exempted from taxation and assessment for filling, grading and paving the streets, by the contract entered into by the state through the common council and the company, and such contract is valid.

4. The application for an injunction by a stockholder is the proper and only remedy.

Argument.

May it please your Honors:

I will discuss the propositions of law arising upon the facts stated in the bill, which are admitted to be true by the demurrers, in the order previously mentioned; and will endeavor to satisfy the court that the appellee was entitled to the decree rendered by the Circuit Court.

The appellant claims that the assesments made against the property of the North Chicago City Railway Company for the purpose of paving the streets occupied by its tracks were authorized by law, and that there is no legal excuse why they should not be paid. The city also claims that the appellee, who is a shareholder in the corporation, is not entitled to the relief sought in a court of equity. The appellee takes issue on these propositions, and, although I have not seen the brief or argument for the appellant, will present such considerations as occur to me.

I.

The Railway Company was wrongfully assessed, because there was no law authorizing such assessments to be made on such property of the company.

The city of Chicago is a municipal corporation, and like

such corporations, can only exercise the powers granted by the legislature, and these must be exercised in the manner prescribed.

The city was authorized by its revised charter (Feb. 13, 1863) to cause any street to be filled, graded, curbed and paved.

Gary's Laws and Ordinances of Chicago, 60.

The same law required the amount necessary to pay for such an improvement to be assessed by the Board of Public Works "on the real estate fronting or abutting on the "contemplated improvement; said assessment to be made "in such manner, as nearly as may be, that each separate "block, lot, sub-lot, or parcel of land, on either side of the "street or part of street to be improved, shall sustain the "cost and expense of making or completing the improve-"ment upon that half of the street directly adjacent to or "in front of the same."

Charter 1863, *chap.* 7, § 21.
Gary's Laws and Ordinances of Chicago, 69.

The next section reads as follows, to wit:

"Sec. 22. Where, in any case, any portion of the cost "and expense of making any improvement mentioned in "the foregoing section, shall by virtue of any valid law or "ordinance of the corporation, or by virtue of any valid "contract, be chargeable upon any railway company; the "amount so chargeable may be assessed upon said railway "company, and the balance only upon the real estate "fronting or abutting on such improvement; and the city "may collect the amount so assessed upon the said rail-"way company by distress and sale of personal property

"as in other cases, or by suit brought for that purpose; "provided, that any real estate belonging to such railway "company and fronting or abutting upon the said im- "provement, shall be assessed as in this other cases."

The Supreme Court of Illinois held the provisions just quoted to be void.

These sections imposed the burden of such improvements equally upon every front foot of the street proposed to be improved without regard to its value or the benefit arising from the improvement, while the constitution required all taxes to be uniform and according to the value.

Larned v. *Chicago et al*, 34 Ill., 265.

In 1865, the legislature amended the charter so as to conform to the decision of the Supreme Court.

It was then provided that the cost of the proposed improvement should be assessed by the Board of Public Works "upon the real estate by them deemed benefitted "by any such improvement, in proportion, as nearly as "may be, to the benefit resulting thereto."

Section 22 of the act of 1863 was repeated, except that the words "and the balance only upon the real estate "fronting or abutting on such improvement" were omitted, and the words, "and the balance only upon the "real estate benefitted thereby" were substituted, so as to place the same in harmony with the preceding section.

Gary's Laws and Ordinances of Chicago, 177, 178.

Subsequently the validity of the provisions of 1865 were questioned, because *all* the cost of the proposed improvement was to be apportioned on the real estate deemed benefitted, whether the aggregate of such benefits equalled the cost or not.

In order to meet this difficulty, the legislature in 1867 passed a further amendment, by which it was made the duty of the Board of Public Works to ascertain "how "much of the expense might properly be chargeable to "real estate especially benefited by such improvement, "and how much thereof might be properly chargeable to, "and paid out of, the general fund, or out of the proceeds "of any general tax authorized to be levied by said city," and the common council was to finally determine how much of the cost was to be paid in each of these two methods.

Amendment City Charter 1867, ch. 2, § 14, Laws 1867.

There were no other statutes in force at the time the assessments in question were made.

It is clear that the cost of grading and paving the streets of the city was to be paid from money obtained from two sources, *first*, from an assessment made on the *real estate* benefited, apportioned in proportion to the benefits thereto, and *second*, from taxes assessed and collected for the general expenses of the city.

Therefore, the only special assessment authorized by law was to be made on *real estate benefited* by the proposed paving, and the aggregate of the benefits was to be apportioned on all the real estate benefited in proportion to the benefits thereto, and the balance of the expense was to be paid from the city treasury.

It is not all property that may be included in the term "real estate" that is within the meaning of the city charter. It was intended to include lots, blocks, sub-lots,

lands, capable of being described by metes and bounds or numbers, and not intangible or incorporeal rights, or chattels real. It was not intended to include the land occupied by the streets themselves, or any right appurtenant thereto. The assessment is *in rem*, and not against the owner or occupant.

This is ascertained by an examination of the various provisions of the charter in force when these assessments were made, and the laws touching the same subject which were in force before that time, but then repealed.

The law of 1865 was an amendment to the revised charter of 1863, and on the subject under discussion repealed sections 21 and 22, chap. 7, because of the unconstitutional rule of assessing by the front foot, and enacted sections 1 and 2 of the act of 1865. The other portions of the revised charter of 1863 were left in force.

Section 32, chap. 7, of the revised charter of 1863 declares "that where there is no agreement to the contrary, "the owner or landlord, and not the occupant or tenant, "shall be deemed the person who ought to bear and pay "every charge or assessment made for the expense of any "public improvement."

Gary's Law and Ordinances of Chicago, 74.

This shows conclusively that the assessment was to be made against the land or lot, without reference to whether there was an estate in fee, for life, or years, or a tenancy for a term of years, or otherwise. The owner in fee was to pay and not the occupant under him holding a less estate.

Section 7, chap. 9, of the revised charter of 1863, required the city clerk, when any special assessment was confirmed, to issue a warrant for the collection thereof, with the description of the real estate assessed.

Gary's Law and Ordinances of Chicago, 86.

Section 12, chapter 9, directed the Collector at a time specified, to make application for judgment against the several lots or parcels of land, or other property described in such warrants for the amount ot assessments thereon. The judgment was to be rendered against the several lots or parcels of land, or other property described. (Sec. 15.) The process was to follow the judgment. (Sec. 17.) The smallest portion of ground to be taken from the east side of the premises, was to be sold. (Sec. 20.) Redemption was allowed, and deeds to be made. (Sec. 23.) Such tax deeds were to be *prima facia* evidence that the land or lot was subject to taxation, &c., and the person questioning it must show that he owned the land or lot, &c. (Sec. 26.)

Gary's Laws and Ordin. of Chicago, 88 *et seq.*

The legislation next prior to that of 1863 was in 1861, when the expense of improving the streets was to be assessed on the lot, sub-lot, piece or parcel of land fronting, bounding or abutting thereon, and shall be in proportion to the number of front feet of the said lot, sub-lot, piece or parcel of land so bounding, abutting and fronting on such improvement.

Gary's Laws and Ordin. of Chicago, 624.

The legislation next prior to that of 1861 was in 1857, when the Collector was directed to obtain judgment against the lands, lots, and parcels of land for the amount

of the assessments due thereon. Judgment was to be rendered against such lands, lots and parcels of land, they were to be sold, &c.

Gary's Laws and Ordin. of Chicago, 611.

Similar provisions existed in all the legislation on this subject from the time that Chicago was incorporated.

None of these laws contemplated an assessment on anything other than land, and such an one was to be against the land without reference to who was the owner or how many estates covered the real estate. The laws did not refer to any leasehold interest, or any incorporated right; it did not intend that the occupant or his interest should be assessed. We cannot find that any right of transit or user in the streets, or the streets themselves were to be assessed for their improvement.

The second section of the act of 1865, which is for the purpose of discussing this point, the same as section 22, chap. 7, Revised Charter of 1863, does not affect the proposition. That section supposes the existence of some contract by which some *fixed* sum was to be paid by a railway company for the improvement of the streets, and does not refer to an assessment based on benefits. By reference to an ordinance in the Record (page 18), passed August 10, 1864, it will be seen that there was a contract with regard to the streets named therein, that the Railway Company was to pay for paving a part of them, not such sum as might be assessed for benefits, but the entire cost of eight, or sixteen feet, as the case might be. This is one example of the cases covered by the section under discussion, and there were others.

The appellee, therefore, claims that the City Charter did not intend that all real estate should be assessed to pay the expense of street improvements, but only lots, blocks, and parcels of land out of and abutting on streets in proportion to the benefits thereto; and that it did not contemplate the interest of a Horse Railway Corporation in the streets, even if such interest could be embraced within the term real estate for some purposes.

But the appellee insists that "the right of way or ease-"ment superstructure, tracks, turn-outs, switches, and all in-"terest of the North Chicago City Railway Company in "the parts of the streets proposed to be improved for the "distance occupied by said Company," which is the description of property assessed, is not real estate in any sense of the term.

The fee of the land occupied for the streets in Chicago is in the city for the public use. The occupation of the same for a railway track is consistent with its use by the public as a street, and no compensation can be allowed to the city or the original owners of the soil, or to abutting lot owners.

Moses v. *The P. & Ft. W. R. R. Co.*, 21 *Ill.* 516.

The license to the Railway Company to construct and operate its tracks is based on the benefits conferred on the people who wish to travel in the cars. The proprietors are allowed to charge a fare as interest on the outlay for the construction and operation of the road.

Com. v. *Temple* 14, *Gray* 69.

The grant to the North Chicago City Railway Company did not invest it with any title in the land occupied by the street. At most it was an easement.

A horse railway is constructed in streets not paved, by laying cross-ties, upon which wooden stringers are placed, and upon these the iron rails are spiked. This superstructure of wood and iron is placed in the earth, or the grade is raised, so that the rails are not above the surface of the street. In streets paved with wooden blocks, as these streets were proposed to be improved, the cross-ties are dispensed with, and wooden stringers are laid down instead of a tier of wooden blocks, to which the iron rails are spiked. These are laid so that the top of the rails are a little below the surface of the pavement. The ordinance fixing the rail (*Printed Record*, 16), requires the rail to be six inches wide, and the width of the tram four inches; this forms the depression for the flange. Ordinary vehicles can use any and all parts of the street, and the rails are so laid that wagon and carriage wheels can run on the tram, with more ease than on any other part of the street.

The cars do not use and have no exclusive right to use any part ot the streets. The only difference between such cars and ordinary wheeled conveyances is, that from the construction of the cars they can only run on the iron rails, and are not obliged to turn out from this track. This is a law of the road made for the accommodation of the public, not for the railway corporation.

Com. v. *Temple*, 14, *Gray* 69.

The only acts that can be done by the Railway Company is to lay its wood and iron in the streets, to run cars thereon, and charge a fixed fare for each passenger.

To do this, the Railway Company buys wooden stringers, iron rails and nails, horses, harness, and cars, and provides itself with suitable stables and car rooms. It may have an office, with the usual furniture, to transact its business. It holds and owns no other property. The corporation is composed, like all others, of corporate members, whose interest in the corporate property is represented by shares of stock, which are personal property.

Any person or corporation may run carriages on the streets, and receive fare for transportating passengers. The only right conferred upon the Horse Railway proprietors other than this, is the right to lay down, as a part of the pavement, its iron rails, and when laid, their cars are not required to turn aside from the track.

The Railway Company does not acquire any title or interest in the land occupied by the street. The title remains as before, in the city. The shareholders may transfer the shares of stock which conveys such rights as the company has, but the corporation cannot convey the street, or any estate therein for years, or the life of the corporation. The company cannot maintain an action of trespass for any injury to the street, or any part of it, because it has no title.

If the company owned the soil of the street, the wood and rails composing the track might be considered fixtures and become, when imbedded in the earth, a part of the land; but as it is without ownership therein, these do not become fixtures, but remain as before, personal property. Such is the established law in regard to fixtures.

Such a right in the railway company does not even rise to the dignity of a right of way. The public had a right

of way over the land in these streets before any track was laid therein, and the railroad corporation had, in common with the rest of the public, the legal right to travel therein. It was not in the power of the city or the State to authorize any use of the land composing the streets, inconsistent with the right of the public, to use them as highways. But it is competent for the law-making power to prescribe the manner in which the streets might be used, to advance, not defeat the public interests. And it is on this principle alone that the railway track can be allowed at all. A right of way over a right of way would be a novelty, except in cases were one thoroughfare crosses another. A private right of way in a public highway cannot exist. (*Washburne on Easemuts*, 217; *State vs. Jefcoat*, 11 *Rich.*, 529.) What, then, is the estate or interest of the Horse Railway Company in the streets of the city? Is it an easement? or a right of way? or an estate for a term in the land? or is it merely a license?

Unless it is such an estate in the land as to constitute *real estate*, the property is not liable to assessment. The appellant relies upon the decision of the Supreme Court of Illinois, in *The City of Chicago* v. *Baer et al.*, 41 Ill., 306, which is made a part of the bill, as authority, that declares that it decides that immovable property, whether real estate or not, is to be assessed for the purpose of paving the streets, and that the railway property is real estate. I have already referred to the provisions of law, which show that real estate only can be assessed, and only a certain class of property of that description can be subjected to such an expense. The law does not contemplate or permit the imposition of such a burden on *immovable* property, which is not real estate.

The distinguished Judge who prepared the opinion of the court, states that every estate in land is subject to assessment, and in certain supposed cases the burden must be discharged by the lessee. To support the proposition, reference is made to *Prettyman vs. Wolston*, 34 *Ill.*, 191. But, section 32, chapter 7, Rev. Charter of 1863, (*Gary's Laws*, 74,) was overlooked. That section declares the owner or landlord, and not the occupant or tenant, shall be deemed the person who must pay every assessment for any public improvement. I am unable to see how the view of the court can be sustained, and it is certain that the reason presented does not exist.

A careful analysis of this opinion does not show that the court considered the railway property real estate. The most that is said is, that "this franchise and right of occupancy together constitute a property, fixed and immovable in its character, *like realty*, and recognized and protected by law as fully as a fee simple in land."

The opinion quotes with approbation the case of *Rex v. Brighton Gas Light Co.*, 5 *B.&C.* 466, as authority to support the conclusion that such railway property in the streets should be assessed; and it is claimed by the appellant that this decision establishes the proposition that the railway property is real estate. But this case does not authorize any such conclusions. The 43 Eliz. directed that all "*occupiers of land*" should be rated for the support of the poor of the parish. The Brighton Gas Light Co. had their gas works in Rothingdean, and laid its pipes through Brighton to supply Boothelmstone. The company had the *exclusive* possession of the land in Brighton in which its pipes were laid, and for that reason the court held that it was an "*occupier of land*" within the meaning of 43 Eliz.

The Supreme Court of Illinois seems to infer from this decition, that such an use and right to the soil not only

constituted the Gas Company an "*occupier*," but that it establishes the doctrine that such property is taxable, by the rules of the common law, as real estate or "fixed property." No such inference is justified because it is a mere construction of a statute. We are not left to argument on this point, for it has been expressly decided. If the learned Judge had pursued the English cases to a later time, he would have found that such an inference, as well as the grounds of his opinion, had been overthrown.

In 1851 this question came before The Queen's Bench, in *Chelsea Water Works Co. vs. Bowley*. This company was empowered to lay pipes for water works through the streets and roads in and about Westminster, and did lay down pipes through the Streets of St. Margaret and St. John, Westminster. The company had no other interest in the soil of these two parishes than arose from having the pipes thus laid down. The company was, in 1847, for the first time, assessed to the land tax by the commissioners of these two parishes, and the property was described as "Land occupied by the mains and pipes and other apparatus of the said Governor and company, for the conveyance and supply of water." The question submitted was, whether the company was to be assessed towards the land tax within St. Margaret and St. John, under the circumstances.

The opinion of the court was delivered by Lord CAMPBELL, C. J., and applies so well to the case at bar, that I insert it in full. It is as follows:

"We are of opinion that the Chelsea Water-Works Company are not liable to be assessed towards the payment of land tax within the division of St. Margaret and St. John, Westminster. We should have no difficulty in arriving at this conclusion, had it not been for

the decisions holding this and similar companies liable to be assessed to the poor's rate under statute 43 Eliz., C. 2, in respect to the same subject matter.

" The validity of the present assessment is rested on the 4th section of statute 38, G. 3, C. 5, whereby it is enacted that all bodies corporate having or holding any lands or hereditaments shall be charged to the land tax. The question is whether, in respect of what the company have done, and now enjoy, under the powers conferred upon them by sections 8 and 9 of statute 8, G. 1, C. 26, they can be said to have or to hold any land or hereditament. Although it has been considered for more than a century that they do not, they could not resist the assessment if they were ever liable to be assessed for the land tax. But we think thet the parishes through which their pipes run, have acted properly in omitting to assess them. The right in question, where exercised, appears to us to be in the nature of an easement, and neither land nor hereditament. The right is to convey water through the land of another; (*a*) whether the water is to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appears to us for this purpose to be immaterial. The mere power to lay the pipes in land cannot be considered land or hereditament; nor do we think that the pipes when laid can be so considered, within the meaning of the Land Tax Acts. These Acts, in speaking of lands and hereditaments, contemplate property to be let by a landlord to a tenant, and property, the land tax of which might be redeemed. The whole scope of the Acts is to throw the tax as a charge upon the landlord; and the tenant, having paid the tax, is authorized by section 17 of statute 38, G. 3, C. 5, to deduct it out of the rent. The company are not the owners of the land where the pipes lie; nor are they the tenants of this land; and there is no rent from which they can deduct the amount of the assessment, when they have paid the same.

" Again, the provisions of statute 42, G. 3, C. 116, for the redemption of the land tax, are wholly inapplicable to such a subject, although it was clearly intended that the land tax on all property which could be considered *land*, was to be redeemable. The moment the company take

up their pipes which had been laid under the streets of any particular parish, all pretence for saying that they have or hold land in the parish, would be gone; but after the pipes are removed, all the land in the parish would remain, and it would be *had and held* as before.

" The Bath, Brighton and Chelsea Waterworks case (*a*) touching the assessment of companies for the relief of the poor, in respect of pipes for the conveyance of water or gas, (*a*) " occupiers of land," have been very properly and much relied upon, for they appear to be closely in point. We, by no means, feel ourselves at liberty to overrule these cases, or even to express a doubt whether they were rightly decided. But, " land," like the word, " inhabitant," which likewise occur in Stat. 43 Elis, C. 2, has various meanings; and it may, in that statute, passed to throw a charge upon the *occupier*, mean the ground on which the chattel is deposited in the exercise of an easement, although, in other acts of parliament, it means a legal interest in the soil. This is the meaning which we think it bears in the Land Tax Acts; and, if so, the company had not, nor held, any land or hereditament which rendered them liable to be assessed to the land tax: and they are entitled to our judgment.

(*a*] Rex v. The Corporation of Bath, 143, 609.
Rex v. Brighton Gas Company, 5 B. & C., 466, (E. C. L. R. Vol. 9.)
Rex v. The Chelsea Waterworks Company, 5 B. & A., 156, (E. C. L. R. Vol. 27.)"

I refer to another English case later than that of the Brighton Gas Company, having a more exact application to the case at bar.

The Mersey and Irwell Navigation Company had a right to construct locks and to run boats through them and in the waters of the rivers Mersey and Irwell, and it was assessed under the Statute of 43 Elizabeth. But the court held that it was not an occupier of land, and was not the owner of land, so as to be taxed; that it was a mere easement.

Rex v. *Mersey & Irwell N. Co.* 9 B. & C. 95.

The Supreme Court of Pennsylvania held that the bed, berme bank, tow-paths, toll houses and collector's offices of a canal company were not taxable as lands, houses or lots. *Schuylkill Nav. Co.* v. *Berks County*, 11 Penn. S. R. 202.

The Supreme Court of Rhode Island has discussed this question in a very satisfactory manner, in *Providence Gas Co.* v. *Isaac Thurber et al*, 2 Rhode Island, 15.

In that case, the Gas Company had laid gas pipes in certain streets designated by the Board of Aldermen. The assessors assessed the company for its gas pipes laid in the streets as real estate. The statute authorized the assessment of taxes for real estate to be assessed upon the owners or upon the persons who hold and occupy the same. The court held the company to be occupants of real estate, because the pipes were fixtures, being annexed to the freeho ld but expressly decided that they could not be assessed as real estate, or against the company as owners.

If the wood and iron laid in the street are fixtures, they are fixtures in the land owned by the city for public use, and become a part of this land. As such, they could not be assessed.

It can scarcely be contended that the "interest of the North Chicago City Railway Company in the streets," by which, I suppose, the franchise is meant, can be a fixture to land or real estate in any sense. It is equally true in regard to the cars, horses, harness, and the right of way. Yet, all these were assessed.

For these reasons, I conclude that the interest of the Railway Company is no more than a license to use the street

in a particular manner, consistent with its use as a highway.

If, however, it is an easement, or right of way, it is not real estate. A contract for the right to pass over the lands of another is an easement, extending only to a temporary disturbance ot the owners possession. The grantee of such an easement is not the owner or occupant of the estate over which it is granted.

35 Ill. 464.

Washburne on Easements, 10, 13.

Rex v. *Mersey & Irwell Nav. Co.* 9, B. & C., 95.

II.

These assessments are such a gross abuse of power that they are fraudulent and void.

The Board of Public Works fixed upon the several sums mentioned in the bill as the expense for making the proposed improvements, in the aggregate, $160,333.73. By the law, the Board was authorized and required to assess such part of the expense against all the real estate benefited, in proportion to the benefits thereto. Claiming to act under such authority, the several sums mentioned in the bill, in the aggregate, $28,676.94, of said sum of $160,-333.73, was assessed against the Railway Company as the benefits accruing to such part of the property as was in the parts of the streets to be paved. In other words, the Board of Public Works decided that the Railway Company would be benefited $28,676.94, *nearly one-fifth of the whole cost.*

In what way is the property of a Horse Railway Company benefited by having a new pavement? In the case of lots on the street, the land is increased in price and they

will bring greater rents, arising from the advantages of access. The property of a Horse Railway can only be benefited by an increase in its net profits. The profits can be increased by greater receipts and less expenses. The number of passengers is not as great with good pavement as with a bad one. The pavement may lessen the expenses by saving wear on cars, perhaps on horses; and may lessen the expenses for repairs. The experince, however, in Chicago, proves that nothing is saved on the repair account or for horses, by having the wooden block pavement. The benefits are practically nothing.

It will be said that these are matters of mere opinion, and that the action of the Board of Public Works is conclusive. This is true, unless such action is so oppressive as to amount to a fraud. Such is the case here. The facts alleged in the bill and the amendment, and admitted by the demurrer, place this proposition beyond dispute.

The right of way, easement, tracks, etc., and the entire interest in the parts of the streets to be paved was worth only $75,000 when the assessment was made.

The laying of the new pavement destroys entirely the superstructure and tracks worth $40,000, and requires the company to replace the same at a cost of $40,000. The company is then required to pay the assessments, $28,676 94. When the whole work is done and the money paid, "the property of the Railway Company will not be increased in value," that is, it will not be worth $75,000.

How does the account stand? The Railway Company have, before the proceedings are commenced, $75,000 worth of property, and when they end it has $75,000 worth of property. Yet, these proceedings require the company to lose $40,000, by throwing away its old materials, and to

spend $40,000 to replace them, and to pay $28,676.94 for the privilege of losing $80.000. The whole cost of the new improvements is $108,676.94 to the company; and it has property of the value of $75,000. Instead of benefits, this shows that the damages are $33,676.94.

These facts appear from the bill, but this is not the only damage. It is evident that the business of the company must be interrupted while the work is being done, whereby the receipts are diminished.

Such an assessment is so gross, so oppressive, so fraudulent in its effects, that it cannot be attributed to an impartial exercise of judgment, but is the result of passion, prejudice, or other unlawful influence.

The truth is, that each of these streets are forty-eight feet wide and are occupied by a double track. The public clamor insisted that the company should be assessed for sixteen feet in width, or one third of the whole cost, because that was the obligation of the company in regard to repairs, while the railway proprietors insisted there was no liability whatever to assessment, and the Board of Public Works, arbitrarily established the rule that about one-sixth should be paid, splitting the difference" between the two. I make this statement outside of the record to explain how such a result was reached.

As fraud makes void all acts, it is claimed that these assessments are void, and that it is the duty of a court of equity to declare them void and restrain the collection and payment.

The bill avers that the property assessed is not real estate, and this is admitted by the demurrer.

III.

The Railway Company and its property is exempted from taxation and assessment for filling, grading and paving the streets, by the contract entered into by the State, through the common council, and the company, and such contract is valid.

In discussing this point, the first inquiry is, what are the terms of the contract?

The City of Chicago has no power to grant such privileges to the Railway Company, except it be authorized by the State Legislature. The contracting parties are, therefore, the State and the Railway Company. The city was the mere agent of the State to fix the terms and conditions by which the streets named by the common council might be used.

The horse railway was an improved method of passenger carriage in a city, and its construction was considered as so desirable that inducements were held out to capital to furnish such facilities.

Like all other enterprises of this character, the acceptance of the charter, and investment of the necessary capital to build and operate the road, is an adequate consideration for the grant of the franchise and privileges. This alone constitutes the charter and ordinances passed thereunder a contract.

But the charter, in words, authorized the common council to make a contract with the Railway Company, in which the terms and conditions, rights and privileges, were to be fixed, and the streets to be designated. Such

a contract was made by the passage of an ordinance and its acceptance by the Railway Company. The agreement thus consummated became a part of the charter from the State, the same as if it had been a part of the act of the Legislature. If there could be any question about this, it was removed by the act of the Legislature of 1865, when the ordinances, &c., were all confirmed.

Aside from the creation of a corporation with the usual elements, by the State, the *only* right or privilege conferred on the corporators, which they did not already have as natural persons, was the right to dig in the soil of the streets, to lay therein the railway track, and to keep the same there, doing the necessary acts to keep it in repair, for twenty-five years.

As already said, all persons may run carriages in the street, and carry passengers and their ordinary baggage for hire, and, subject to police regulations, fix the rates of fare. The superior rights of the cars to remain on the iron rails, while other vehicles must turn off for the cars, is not granted in the charter or the ordinance passed thereunder. It is the law of the road, arising from necessity, and to accommodate those who ride, and not the proprietors.

Conn v. *Temple*, 14 Gray, 69.

On the other hand, aside from the agreement to invest the capital, required of the corporators, to construct the road and to run the cars, the railway proprietors agreed to do several things. They were to furnish cars of the best style and class, to propel them by animal power, and to transport passengers and their ordinary baggage only, for the limited price of five cents for each passenger, any

distance within the city limits; they were to lay the track with modern, improved rails, (which have since been prescribed by the common council,) so that they should not be elevated above the surface of the street, and so that carriages and other vehicles can cross the tracks freely and without obstruction; they were to complete the several lines within the times fixed in the contract, and they were to enter into bond to the city that the lines should be completed within the times mentioned, and that the ordinance should be observed.

In addition to these stipulations on the part of the Railway Company, the corporators make an important covenant in regard to the improvement of the streets. This is found in section 7 of the ordinance of May 23, 1859. I reprint it here, although given in the statement of the case:

"SEC. 7. The said company shall, as respects the grading, paving, macadamizing, filling or planking of streets, or parts of streets, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railways, on all streets where one track is constructed, and sixteen feet in width along the line of said railway on all streets where two tracks are constructed, *in good repair and condition*, during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the *ordinary repair* thereof, may be passed or adopted by the common council of said city. And the said company shall be liable for all legal consequential damages which may be sustained by any person, by reason of the carelessness, negligence or misconduct of any of the agents or servants of said company, in the course of their employment, in the construction or use of the railways aforesaid, or any or either of them."

The counsel for the appellant claims that this section defines the duty of the Railway Company in regard to the ordinary repairs of the streets, and leaves its property subject to special assessments for the expense of a new pavement, or to an assessment for benefits arising from the making of the new pavement.

This position is unsound.

The question is one of construction, and to determine the true meaning we must look at the situation of the parties, as well as the language itself. Pursuing either mode, the question is free from reasonable doubt. We must also look at the construction placed upon it by the parties themselves.

One of two propositions is true, namely: Either there was no legal liability upon the company or its property, to contribute to the repair or improvement of the street, in any way, in the absence of a provision on that subject, and the design was to impose the burden on the Railway Company to keep a defined part of the street in good repair and condition, for the benefit of the public; or, if there would be a liability upon such property to taxation or assessment for repairs and new improvements, it was the design to fix the liability to keep the defined parts of the streets in repair, and exempt the Railway Company from all assessments for any improvement in the street, as re-

spects the grading, paving, macadamizing, filling, or planking of the streets.

I have already argued the proposition, that such property is not real estate, or subject to special assessment for either the repair or improvement of the street. If this is made out, then there was no liability thrown on the company or its property for this purpose. Before the track was laid, the entire liability to special assessment was on the lots abutting on the street, and other lots benefited by the proposed improvement. No such imposition could be laid on the land occupied by the street. The city authorities undertook to lessen the burden on the property that had hitherto borne it, by taking from it the expense of keeping in repair eight and sixteen feet in width, and throw it on the Railway Company as one of the conditions on which it might occupy the streets. Taking advantage of the desire of the company to put down its superstructure in the streets, the city said, You may do so, but you must assume a burden that cannot be imposed without your consent; you must keep a certain portion of the streets occupied in good order for the public use. This stipulation implies that the parties understood there would be no liability under the law, on the part of the railway corporation, to be specially taxed or assessed in regard to the repair or improvement of the street.

Let us take the other view. Suppose there was some legal liability resting on such property to be taxed or assessed for the repair and improvement of the streets. The Supreme Court of Illinois, in the case of *Chicago* v. *Baer*, have so decided, and for the purposes of the argument of this point, we may assume that such decision is good law.

The seventh section of the ordinance commences by a statement as to what the Railway Company shall do, "*as* "*respects the grading, paving, macadamizing, filling and* "*planking* streets, or parts of streets, on which they shall "construct their said railways." This covers the whole subject of street improvements; it covers certainly the "curbing with curb stone, grading, and paving with "wooden-block pavement," for which the assessments described in the bill were made.

The section then provides what the company shall do about such improvement, namely, it "shall keep eight "feet in width along the line of said railway on all streets "whereon one track is constructed, and sixteen feet in "width along the line of said railway whereon two tracks "are constructed, *in good repair and condition* during all "the time to which the privileges hereby granted shall "extend, *in accordance with whatever order or regulation* "*respecting* THE ORDINARY REPAIRS thereof may be passed "or adopted by the said city." It further provides that the company shall pay all damages occasioned by neglect to keep in repairs, etc.

Is it not perfectly clear that the Railway Company agreed to keep the parts of the streets mentioned in good repair and condition, and that such obligation was limited to the ordinary repairs; and that this was the sole duty of such company in regard to filling and paving the streets?

This excludes the idea of any greater liability, and if there would have been any greater burden on the property of the company, this was a contract that it should be *exempt* therefrom.

The consideration for such exemption over and above the acceptance of the ordinance and investment of money in the enterprise, was the agreement to keep in proper order one third of the entire street where a double track should be laid, and one sixth where a single one was laid, without regard to the due proportion of taxation according to valuation.

It may be said that filling, grading, paving, etc., are "ordinary repairs," and therefore within the terms of the obligation assumed by the company. If so, then the company would be bound to make sixteen feet in width of the proposed grading and paving, and could not be *assessed* at all for the expense.

In this case the city has not proceeded on that ground, but have followed the decision of the Supreme Court of Illinois, in *Chicago* v. *Baer*, as expressly alleged in the bill, and treated this whole section as void, and assessed the property of the railway as if section seven did not exist.

If it is considered at all important to determine whether such improvements as grading and laying wooden block pavement in a street that has never been paved, as is the case here, are only ordinary repairs, I beg leave to submit some suggestions.

The bill avers that none of these assessments or any part thereof are made for keeping said streets or any part of them in good repair and condition, in accordance with any order or regulation respecting the ordinary repairs thereof. (*Printed Record page* 5.)

This allegation is admitted by the demurrer, and for the purposes of this case is conclusive on that point.

Again the bill avers that the contract has always been understood and construed by the city, its common council and all its officers, and the company, not to make the company liable to assessment for filling, grading and paving, until the decision in *Chicago* v. *Baer*.

Again in 1864, a further ordinance was passed, designating an additional street. (*Printed Record page* 16.) In this the terms of the ordinance was adopted; but not satisfied with this, certain new stipulations were inserted in regard to the street then named. A clear distinction is recognized in section five, between improvements for paving, etc., and repairs. This shows the construction placed on section seven of the ordinance of 1859.

From the statement of the amount and consequences of these assessments, it will be seen that this is a matter of as much consequence to the railway proprietors as all the other provisions combined, inasmuch as the effect of these assessments is such as to compel an expense greater than the entire cost of the property assessed. In deciding upon the intent of the parties, these facts are most important.

It is immaterial to the proprietors of the Railway Company what construction or theory is applied to the contract, provided that their property be released from liability such as is now claimed, and which will in effect *confiscate* their property every time a new pavement is laid. It is not a matter of much consequence what particular view the parties took of the matter at the time the contract was

made, farther than to learn the intent in order to construe the contract. Independent of these considerations, we have the fact that the parties did give a certain construction to this section, that the money was invested upon the faith of that construction, and that all parties have acted upon it. The city is *estopped* from claiming that the contract makes the Railway Company liable for filling, grading and paving.

The bill expressly avers, as before stated, that all parties understood and construed the contract to exempt the company from all liability to assessment for the filling, grading, planking, macadamizing, or paving, and upon the faith of such construction and understanding, as well as the express terms of the contract, the company invested a large sum of money, constructed the railways, and observed and performed the contract in every respect; that no claim to the contrary was ever made prior to 1866 or 1867, when the case of *Chicago* v. *Baer* was decided, and these assessments described in the bill, were made, not under the provisions of the contract, but under color of that decision, upon the theory that the property of the company was liable to assessments, for benefits, like real estate.

These averments of the bill are likewise admitted by the demurrer, and being admitted, these facts settle beyond question the construction that must be given to section seven of the ordinance of May 23d, 1859.

This brings us to the most important question in the

case, and that is the validity of said section seven. If it is in force, then it is necessary to give it a construction.

Is the contract which exempts the railway property from liability for grading and paving the streets valid?

I repeat that the contract is to be treated as if made directly between the State and the Railway Company. The question is, can the State Legislature make a contract exempting the property of a corporation created by it from taxation or assessments for benefits?

It is the settled law of this court, that a Legislature can by contract with a corporation, exempt its property from taxation for a consideration, or commute taxes, so as to bind the State.

Jefferson Branch Bank v. *Skelly*, 1 Black. 446.

State Bank of Ohio v. *Knoop*, 16 How. 369.

Dodge v. *Woolsey*, 18 How. 331.

New Jersey v. *Wilson*, 7 Cranch., 164.

It is equally well settled law in Illinois:

State Bank v. *The People*, 4 Scam., 304.
Ills. Cent. R. R. v. *County of McLean*, 17 Ill., 291.
Newstadt v. *Ill. Cent. R. R.*, 31 Ill., 484.
Hunsaker v. *Wright*, 30 Ill., 147.

By the decisions in Illinois, all kinds of taxes may be commuted without any violation of the Constitution.

This was the declared law at the time the contract in this case was entered into, and such construction of the Constitution became a part of the agreement. A subsequent decision of the Supreme Court cannot change the rights of the parties, because it impairs the obligation of a contract.

It may be said that these assessments are not taxes, but the measure of the benefits accruing from the improvement. If they are not taxes, we may still look in vain for any provision of the State Constitution prohibiting the legislature from releasing the company from liability therefor; and under a universal rule a State Legislature may do whatever is not prohibited.

The general laws of Illinois in regard to right of way passed in 1852, as well as many special provisions in other statutes require the payment of the value of all lands, in money, taken for public use, without considering benefits to the land. The Legislature may waive benefits either partially or wholly. If such benefits are waived, it requires taxation. Under the rule taxes may be commuted for a consideration, and why not benefits?

It will be difficult to establish the proposition that such assessments for benefits are not taxes. It is a mode of raising money for payment of the expenses of the public, and only differ from taxes collected on property according to a valuation, in the rule by which the money is raised. That is rather in theory than in fact.

I am aware that the power to collect money from property to pay for improvements has been referred to the power of eminent domain. I will leave the counsel for the appellant, to demonstrate how it can be properly so refered. If it can, there is nothing in the State Constitution fixing any rule by which it shall be exercised, the only provisions in that instrument refer to taxes assessed according to the value of property.

I admit the justice of laying burdens of this character with uniformity. I also admit, that, in the exercise of the power of eminent domain, private property cannot be taken for public use without compensation, or private property taken from one person and transferred to another. But a commutation of such burdens for an adequate consideration, is not a violation of these principles.

In this case, it is a fallacy to suppose that because the Railway Company might be released from the payment of money for such an improvement, that other property must be assessed more than its proportion of benefits. Such other property would be assessed exactly the same in one case as the other. The sum for which the Railway Company would be excused would be paid from the general fund raised by ordinary taxation according to the principles laid down in

Larned v. *Chicago*, 34 Ill. 281.

Therefore, the effect is upon taxation in the usual modes, which may be commuted, as already shown.

Again, if such a power is based on the right of eminent domain, or on the right of taxation, the contract in this case provides an equivalent for the liability of the Railway Company to contribute to the expense of paving, &c., and thus it is not a violation of the doctrine that compensation shall be made, or that taxes shall be uniform.

The contract imposes the entire burden on the Railway Company to keep a definite part of the streets in good repair and condition, thereby discharging the other property owners from contributing at all to that expense. And the contract required the Railway Company to construct its lines of railway on these streets within a fixed time, and thereafter to operate them in a certain manner, and transport passengers at the low rate of five cents each. This increased the value of the other property for the transaction of business, and in that way furnished a good consideration for the exemption.

The legislature was the proper judge as to whether such considerations were an equivalent for the burden which it was agreed should not be imposed. It decided that it was an equivalent. Therefore, the principles of the Constitution, supposed to prohibit such a contract, have no application.

The appellant relies upon the decision of the Supreme Court of Illinois in *Chicago* v. *Baer*, as sufficient authority on this point.

That court does decide that the seventh section of the ordinance of May 23, 1859, conflicts with the Constitution of the State, and that the city could not make such a stipulation, nor the legislature authorize it to be done.

The reason assigned is that special assessments for benefits are to be governed by sections 2, 5, and 6, Art. 9, of the State Constitution which requires taxation to be uniform in respect to persons and property.

A reference to the opinion will show, that the only reason brought to the attention of the court why the railway property was not liable, was that it was not real estate. The question of commutation was not argued or considered.

If special assessments for benefits is to be brought by *construction* within the rules for taxation, and taxes may be commuted and waived for a proper consideration, then it follows beyond dispute that special assessments may also be commuted and waived, the same as taxes. No reason can be assigned in favor of of making a discrimination.

As this court has decided in several cases, and the Supreme Court of the State of Illinois has also held repeatedly, that a legislature may by contract waive taxes for a consideration, of which the legislature is the judge, so it must be held that special assessments for benefits, whether made under the right of taxation or eminent domain, may likewise be waived for a valid consideration.

The Court will recognize the gross injustice in declaring a contract void upon debatable grounds, after it has stood for years, after it has been performed faithfully by the party to be injuriously affected thereby, and after such party has in good faith invested a large amount of money. The impropriety of such a course becomes more apparent, when we see that the consequences of such a decision is to compel the railway corporation to repeat its entire investment every time a new pavement is laid. It requires

no assertion from us, to enable the Court to understand that the investment would never have been made, if such a consequence could have been foreseen, and that the result of such a decision now, will be to compel the company to abandon its franchise and lose all of its property that cannot be sold for other purposes. It is literally impossible for such property to bear these burdens, and perform the other stipulations in the contract.

The appellant claims that this Court is bound by the decision of the Supreme Court of Illinois, in *Chicago* v. *Baer*, it being a construction of the State Constitution, and of legislation by the General Assembly.

Whenever a question arises as to whether a contract is impaired by the authorities of a State, whether it arises by legislation or judicial decision, this Court must decide for itself as to the validity of the contract, and in doing so will construe for itself the State Constitution and all acts of the State authorities.

This is so well settled by repeated decisions of this Court, that I need not cite authorities. I refer to only one case, where this point was fully considered.

Jefferson Branch Bank v. *Skelly*, 1 *Black.* 443.

IV.

The proceeding by a stockholder to restrain the collection and payment of these assessments is the proper remedy.

The directors of the railway corporation exercise a trust for the shareholders, and must use the funds in their hands for the appropriate objects of the company. If they are about to waste the money of the corporators, by the payment of a void tax or assessment, so as to depreciate the property, or as in this case, destroy the entire value of the corporate property, a court of equity will interfere at the suit of a stockholder to restrain such action.

It is claimed by the appellant that there is a remedy at law, because the charter provides that objections may be presented, when application is made for judgment in the State Court against lands for delinquent taxes.

The answer to this is, that the directors may pay the tax, so that such an occasion may never occur. If they do not, and application is made, the only persons who could appear for the corporation would be its officers; the appellee could not be heard, merely because he owned one hundred shares of stock. But the conclusive answer is, that a court of equity having once acquired rightful jurisdiction, because of the threatened breach of trust, will dispose of the whole case.

It is scarcely necessary to make any other suggestions on this point, because it has been fully considered and decided in

Dodge v. *Wolsey*, 18 *How.*, 336.

The assessments described in the bill are void, as against the property of the Railway Company, and were made by the officers of the city, because of the ruling of the Supreme Court of Illinois, in the case of *Chicago* v. *Baer*. This conflict, with the provision of the Constitution of the United States, because it impairs the obligation of a contract, and the appellee asks this Court to maintain that provision of the fundamental law. To do this, the decree should be affirmed, which restrains the city from collecting these impositions, and the other defendants, the Railway Directors, from paying the same.

In conclusion, I would call the attention of the Court to the opinion of the Supreme Court of Illinois, *Chicago* v. *Baer et al.*,, reported in 41 Ill., 306, so often referred to in the course of this argument, which I append for the convenience of your Honors.

I have also attached the opinion of Mr. Justice DAVIS, as reported in the newspapers, delivered at the Circuit, in October, 1867, in another case, where the same questions presented in this record were considered.

W. C. GOUDY,

Attorney for Appellee.

THE CITY OF CHICAGO,
vs.
LAWRENCE BAER and Others.

Appeal from Superior Court of Chicago.

Mr. Justice LAWRENCE delivered the opinion of the court:

On the 27th of July, 1865, the common council of the city of Chicago passed an ordinance requiring North Clark Street, from the north line of Chicago avenue to the dock line of the Chicago river, to be curbed with stone and paved with what is known as the Nicholson pavement. The commissioners of the Board of Public Works proceeded to make an assessment on the real estate deemed benefited by the contemplated improvement, and reported it to the common council, by which body it was approved, and on the 18th of October, 1865, a warrant was issued for its collection.

At the February Term, 1866, of the Superior Court of Chicago, the collector made an application for judgment against those lots on which the assessment had not been paid. The owners of many of the lots appeared and resisted the petition.

The court sustained their objections, and refused to enter judgment, and the city has brought the record to this court.

In the view we have taken of this case, it is necessary to consider but one of the numerous objections taken to the collector's report. It appears by the record, that a street railway company, called the North Chicago City

Ratlway Company, has possession of a considerable portion of this street by its road-bed, ties, rails, and cars; and that no part of the assessment in question was levied upon the Railway Company. It is not contended that the Railway Company is not benefited by the improvement. That it must be very largely benefited, is a proposition as to which we presume there can be no controversy. We are not advised by the record what is the present pavement of North Clark street, or whether it is paved at all, through the whole distance intended to be covered by the proposed improvement.

If paved, we must suppose the pavement has become imperfect, or it would not be renewed at a heavy cost. But whether this new pavement was to be in place of one of some other kind no longer fit for use, or, to replace the alternate mud and dust of the original street, it is clear that the railway must be largely benefited by the improvement. It must be a matter of great importance to it, to have a smooth and durable road-bed for the passage of their cars, and the travel of their horses. The commissioners have not reported that the railway was not benefited. No question of that character embarrasses the record. It is admitted in all the arguments, that the railway was not assessed, because in whatsoever degree it might be benefited, it was not considered, by the city authorities, liable to any portion of the expense.

The cause is submitted to us upon that issue; and both parties express themselves desirous of a decision that shall settle a question of much importance to the people of Chicago.

We assume then—as counsel have assumed—that the Railway Company would be benefited by the proposed improvement.

The precise degree is, for the purposes of this case, wholly immaterial.

On the 14th of February, 1859, the Legislature passed an act incorporating the North Chicago City Railway Company; and authorized it to construct and operate a railway in such street in the North Division, and upon such terms, as might be agreed upon with the city council. On the 23d of May, 1859, the council passed an ordinance, the 7th section of which purports to fix these terms, and which the company accepted. On the original draft of the ordinance now on file in the city clerk's office, and over a portion of this seventh section, is pasted a strip of paper on which is written what purports to be a portion of the provisions of this section. The writing underneath this pasted paper is not obliterated, and by being held against a strong light can be read. The writing underneath requires the company to keep eight feet of every street occupied by them, if only a single track is laid, or sixteen feet if a double track is laid, in good repair and condition, and to pay, in the same proportion, for any improvement that shall be ordered by the city council. The writing upon the pasted paper is so worded as to make the company liable for only ordinary repairs. The handwriting of the original ordinance and that upon this pasted paper are not the same. It is contended on the one side, that the section which actually was adopted by the council, was that written upon the original paper; and that the pasted paper is a forgery interpolated without the authority of the

council, and never adopted by that body. All this is denied upon the other side, and it is contended that the provisions found upon the pasted paper were a portion of the ordinance adopted. On this issue much evidence was taken, and to its discussion much of the argument has been devoted. Whether, however, this pasted paper was proved to be a forged interpolation by evidence legally admissible for that purpose, is a question which, in the view we have taken of the case, it is unnecessary to decide. It may be remarked, however, that the mere fact that such a question should be made and left in so great doubt, and the evidence embodied in the record in regard to it, show the necessity of adopting some system by the common councils of our growing cities, whose local legislation affects pecuniary interests of great value, that shall not leave in doubt what the ordinances really are, under which the people live.

We now will state the grounds upon which we place our decision.

In our judgment, this case must be clearly decided upon the principles established by this court as the law of this State in the case of the *City of Chicago* v. *Larned*, 34 Ill. 267. That case was very fully argued, and very maturely considered by the court, and we are entirely satisfied with the conclusions there announced. It was then held that the constitutional provision, requiring equality of taxation, applied as well to special assessments for improvements of this character, as to any other form of taxation; that when the burden is to be imposed upon those who are benefited by the proposed improvement, it must be imposed upon

all who are directly benefited in the ratio of the benefits, since it would be a violation of the equality sought to be secured by the constitution, as well as of all just principles of taxation, to exempt a portion of those benefited, and thereby increase the burden upon the remainder. It is true, the right to make these special assessments was referred rather to the right of eminent domain than to the taxing power, and it was said the just compensation required by the constitution might be made in benefits, but it was held that the assessment must be made in the ratio of advantage or benefits, which would necessarily require that it should be imposed equally upon all property benefited equally, or it would be unlawful. The court said: "From the case of the *Canal Trustees* v. *The City of Chi-* "*cago*, 12 Ill. 400, to the present time, the ruling principle "of all of them is, that as the assessments are in the ratio "of advantages, or benefits, they are lawful." Hence the court held, that the assessment for the improvement of a street by which the cost was assessed upon the property bordering the street in proportion to the frontage of each lot, without any reference to the degree in which the different lots might be benefited, was unconstitutional and void, because, under the guise of a special assessment and under the plea of eminent domain, the city was really violating the principle of equality of public burden prescribed by the constitution. The sole question involved and decided in that case, was the same presented by the case at bar. In this case, as in that, the cost of the improvement has been assessed upon the property without reference to the ratio of benefit. Can anything be clearer than that if one-third, or one-quarter, of all the benefit to be reaped by property holders from this improvement accrue to this Railway Company, and yet they are wholly

exempted from the assessment, the other property holders are unequally and unjustly taxed to the extent of that portion which in the ratio of benefits should have been assessed against the railway? In other words, their property is taken for the benefit of the railway. Suppose, for example, a street improvement costing ten thousand dollars was of such a character as to increase to that amount the value of A.'s property, and B. and C. each have property whose value is increased to the same amount, but nevertheless the entire cost of the improvement is assessed upon the property of A.; can his complaints be justly answered by telling him that he is not injured, because, although he pays ten thousand dollars, his property is increased in value to that amount? May he not truthfully reply that he has nevertheless been obliged to pay for benefits to the property of B. and C., and to that extent his money has been taken for their use?

We hold it to be clear, that while the power to make these special assessments may be sustained under the right of eminent domain, yet, in making them, the constitutional principle applies as fully as to the ordinary modes of taxation, that one person's property cannot be improved at the expense of another, and that no special assessment can be sustained which imposes all of the cost upon a portion of the property benefited, and leaves other property equally benefited wholly exempt. That the exact ratio of benefits can be determined with mathematical nicety, is, of course, impossible; but that is the principle upon which the assessment must be made as correctly as possible to fallible human judgments.

In the *Larned* case, the court says:

"We consider that both the exercise of the right of emi-
" nent domain and the power of taxation are limited under
" our constitution; and the rule with us is deduced, not from
" general principles, but from the Constitution itself, that
" there does not exist, either in the Legislature or any of the
" subdivisions of State sovereignty, a power of apportion-
" ing taxes, whether of a general or a local character, ex-
" cept on the principle of equality and uniformity."

This most salutary principle restraining the wanton exercise of municipal authority in making these special assessments, and having its firm basis not only in the constitutional provisions securing equality of taxation, but also in that other principle of constitutional law universally recognized by the American courts, that the property of one person cannot be taken for the use of another, either with or without compensation, must be held as invalidating this ordinance, if it really passed in the form insisted by the appellant, so far as it seeks to exempt the Railway Company from paying for its portion of street improvement in proportion to the benefits received. The city council could make no valid contract of this character, and the Legislature could not authorize it to do so.

The counsel for appellant seek to discriminate between the present case and the *City of Chicago* v. *Larned*, by insisting that assessments can only be laid on real estate, and that the railway company has no real estate, but only a right of way. The position is ingenious, but unsound. The assessment must be laid upon all property that is substantially and directly benefited. This necessarily excludes all property of a movable character. Its value cannot be affected by laying this pavement. But every estate in land adjacent to the street, whether in fee, for life, or for a term of years, may be increased in value. If

adjacent property is held under a lease for fifty or a hundred years, the benefit to the property arising from replacing an old by a new pavement, would probably accrue wholly to the lessee. The pavement would probably be worn out before the expiration of the lease; and therefore the benefit which might accrue to the owner of the fee would be so uncertain and remote as not to be taken into the account. In a case of that character, as between the lessee and the owner of the fee, the former would undoubtedly be required to pay the entire assessment upon the property.

Prettyman v. *Wolston*, 34 Ill. 191.

Now, it is true, as urged by counsel, that the Railway Company has not become the owner of any portion of these streets in fee; but it has certainly, through its charter from the Legislature and its contract with the city, acquired a property in them of the most valuable character, which neither the Legislature nor the city can take away against the consent of the company; and capable, like other property, of being sold or conveyed. The city council has made a contract with the company, by which it has granted to the latter what is substantially a leasehold interest in a portion of this street for a term, by the original ordinance, of twenty-five years. The Legislature, at its last session, extended the charter to ninety-nine years; but whether the city council has extended the term for occupying the street, this record does not inform us. The terms offered by the city in its ordinance were formally accepted by the company, and it executed a bond to the city to secure compliance on its part. By this contract the Railway Company acquires the right to occupy a certain portion of the street, by its ties, rails and cars, so far as may be necessary for operating the railway.

It has acquired rights in the street, which neither any other person or company, nor the general public possess. It can now occupy the street in a manner which would not be permitted without the aid of legislation. If a private individual were to occupy a street in this manner without authority from the city council, he would be liable to prosecution. It is wholly unnecessary to define, for the purposes of this case, what is the precise extent or nature of its property. Certain it is that this Railway Company has a franchise appurtenant to this street; that through this franchise it has a right of occupancy in a portion of the street peculiar to itself, and, so far as may be necessary to run its cars, exclusive; that this right of occupancy is secured for a long term of years; that this franchise and this right of occupancy together constitute a property, fixed and immovable in its character, like realty, and recognized and protected by the law as fully as a fee simple in land; that this property is of a character to be substantially and directly benefited by the proposed improvement; and that, in proportion as it is thus benefited, it should contribute its share to the cost of the improvement, in common with the other property upon the street.

In *Rex* v. *Brighton Gas Light Co.*, 5 B. and C. 466, (11 E. C. L. 543,) the question was, whether the gas company was liable to the poor rates; and this depended upon whether their gas-pipes laid under the surface of the streets, made them "occupiers of land." The court held that the company "were in the exclusive occupation of "that portion of land in which their pipes lay," and that they were liable to be rated for the relief of the poor of Brighton, although their gas works were in the parish of Rottingdean, and the gas was sold and used in the parish of Brighthelmstone, and the only connection of the company with the parish of Brighton was in using its streets

for laying pipes to conduct the gas. Numerous authorities are cited by the court in support of its decision. That is a much stronger case than the present in favor of taxing, as fixed property, a private easement over a public street.

We would remark, in conclusion, that the rule declared in the *City of Chicago* v. *Larned* to be a constitutional requirement in regard to the tax levied under these special assessments, and here re-affirmed, is in conformity with all the charters ever granted to the city, except that of 1863. Those of 1837, 1851 and 1865, all require the assessment to be in the ratio of benefits.

That case, therefore, introduced no new rule into the civil polity of Chicago, nor one difficult of application. The judgment of the court below must be affirmed.

Judgment affirmed.

In the Circuit Court of the United States, for the Northern District of Illinois, October Term, 1869.

Joseph T. White and Elzabeth White,

vs.

The Directors of the Chicago West Division Railway Company, the City of Chicago, and others.

Judge Davis delivered the opinion of the Court as follows :

The complainants allege that they are stockholders in the Chicago West Division Railway Company; that the company is assessed for the improvement of a portion o Milwaukee avenue; that the assessment is illegal; that they have applied to the directors of the company to resist its collection; which (while admitting its illegality) they not only neglect and refuse to do, but threaten to pay it out of the funds of the Company. They, therefore, ask for an injunction against the railway company and its officers, restraining them from paying the assessment, and against the city of Chicago and its collector from collecting it.

A court of equity will not ordinarily restrain the collection of a tax or assessment, even if satisfied of its illegality, but will leave parties claiming to be aggrieved, to their remedy at law. If, however, there is an equity of a nature to give the court jurisdiction, independently of the illegality of the tax as assessed, the Court will interpose its authority on such independent ground, and grant relief.

The directors of a corporation are trustees of the stockholders, and a division of the funds or property of a corporation, by its director, to pay an illegal tax or assessment, would be a breach of trust which the stockholders would have a right to have enjoined in a court of equity.

This doctrine is fully settled in the case of *Dodge vs. Woolsey* (18 *Howard*), and the present case, so far as the facts which give jurisdiction are concerned, is like that case.

The city of Chicago, having determined to pave and grade Milwaukee avenue over which the railway company runs, seeks, by means of the laws of the State, to force the company to pay a certain share of the cost.

The bill denies that the laws confer any such power on the city, but insists, if such is their proper construction, they would impair the obligation of the contract made between the State and the railway company, which exempts the railway company from paying any portion of the expense of such improvement.

If we concede that the laws of the State authorize the assessment, the important subject of inquiry is, whether the railway company is protected by its acts of incorporation. An act of incorporation is a contract between the State and the stockholders. The object for which a corporation is created is such as the government wishes to promote, and the benefits to be conferred by it constitute the consideration for the grant.

Without the privileges given, and securities furnished in an act of incorporation, no one would be willing to risk his time, money, and skill in great public enterprises.

And there is no difficulty in the interpretation of legislative contracts. They are construed like other contracts, and all contracts are to be construed to accomplish the intention of the parties, and if that can be ascertained, it is the duty of the courts to carry it into effect. If, in the application of the ordinary rules of construction to a legislative contract, reasonable doubts arise as to the interpretation to be given to it, those doubts are to be solved in favor of the sovereign power. But, if none exist, then it is the duty of the Court to carry out the true intent and meaning of the parties.

An ordinance was passed by the Common Council of the city of Chicago, on the 23d of May, 1859, concerning the extension and operation of certain horse railways. One of the sections of said ordinance is as follows:

"SEC. 8. The said company shall, as respects the grading, and paving, macadamizing, filling, or planking of the streets or parts of streets upon which they shall construct the said railways, or any of them, keep 8 feet in width along the line of said railway, on all streets wherein one track is constructed; and 16 feet in width along the line of said railway when two tracks are constructed, in good repair and condition during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof, may be passed or adopted by the common council of said city. And the said company shall be liable for all legal consequential damages which may be sustained by any person by reason of the carelessness, negligence, or misconduct of any of the agents or servants of said company in the course of their employment in the construction or use of the railways aforesaid, or any or either of them."

This ordinance was accepted by the company, and has been ratisfied and confirmed by an act of the legislature, and is a contract binding upon the parties.

What is its meaning? Clearly, it seems to me to fix the share of the burden the railway company should bear in relation to the streets over which they should operate their lines of road. For the privileges conferred, the railway obliged themselves, during the whole time of their existence, to keep in good repair and condition a certain portion of the streets, and, in consideration of this, they were relieved from liability to special assessments for street improvements.

Why make any provision at all, if they were also liable to special assessments? There was a work of internal im provement in contemplation, of great benefit to the city, and which the builders of it hoped to make profitable. Naturally, they would wish to adjust, before engaging in the enterprise, their share of the burden that might thereafter be imposed for the improvement and repair of the streets.

The previous legislation by the common council is a great help in arriving at a proper construction of the contract on the 16th of August, 1858, an ordinance was passed in relation to horse railways, requiring the company to pay one-third of the original improvements, and also to keep a certain portion of the streets in repair.

This ordinance was amended in December following, so as to relieve the company from the obligation of paying any part of the over cost of improving the streets. Why this release from the burdens unless the Common Council thought them too onerous? And why not incorporate the terms of the ordinance of August, 1858, into that of May,

1859, if it was the intention to fasten on the railway company the additional burden of helping to build the streets? The parties who contracted in 1859 knew what had been done in 1858, and must be supposed to have contracted with reference to it.

Without presuming the subject farther, it is apparent that the city and the railway company virtually understood this ordinance as fixing the part the horse railway had to do in street improvements. This being the contract between the parties, the State could not pass any law impairing its obligation. In administering the provisions of the constitution of the United States in regard to the power of the State in this respect, the federal court determines for itself what is a contract, and whether it has been violated.

The view which I have taken of the case, renders it unnecessary for me to consider whether the laws of the State subject the railway company, or its property, to special assessments for the improvement or repair of the streets mentioned in the ordinance.

If such is their proper construction, they would impair the obligation of the contract between the State and the railway company.

But it is insisted the constitution of the State restrained the legislature from making a contract like this, as it is in violation of the provisions of the constitution, requiring taxation by counties, cities, &c., to be uniform in respect to persons and property. If the legislature can commute for money all taxes for a stipulated sum for years, why can it not commute for benefits received, which sometimes can hardly be estimated in dollars and cents? In the case of the *Illinois Central Railroad Company* v. *The County*

of McLean, 17 Illinois, the court held that the legislature might commute all taxes for a stipulated sum per year and that such commutation might include property used or owned by the corporation, and was not necessarily confined to a tax on the franchises or privileges of the corporation. I cannot see why the legislature of a state may not, in order to secure for the convenience of the public good horse railways, in consideration of the benefits to be received from them, commute taxes and assessments as well as if money was paid for the charter, and if so, then the legislature is the sole judge of what benefits shall be received from them as a consideration for such commutation. Whether the commutation is wise or unwise is for the legislature and not for the courts to determine.

My attention has been called to a recent decision of the Supreme Court of this state, *Chicago* v. *Bier et al*, as conclusive of this controversy against the plaintiffs. I have the highest respect for the opinion of that learned court, and am always disposed to follow them in cases where, under the constitution and laws of the United States, they are of proper application. But as there are principles in this case, involving the rights of property under legislative contract, the obligations of which, in my judgment, is impaired by the special assessment referred to, I cannot regard the opinion of the Supreme Court of the state, in the case cited, as being of binding force upon the rights of these parties.

Let injunction issue.

In the Supreme Court of the United States.

CITY OF CHICAGO
vs.
WM. C. SHELDON.
} December Term, 1869.

ARGUMENT OF MR. B. R. CURTIS.

This is a bill in equity, filed by the appellee in the circuit court for the northern district of Illinois.

The scope of the bill is, that the complainant is a stockholder in a corporation called the North Chicago City Railway Company; that certain assessments particularly described in the bill have been laid on the property of that company, and warrants for the collection thereof have been issued and are about to be executed. That these assessments are all illegal and void, and the payment thereof by the officers of the corporation would be waste of its funds, and a breach of trust on their part; that the complainant has applied to the board of directors, which has the immediate government and control of the affairs of the corporation, and requested them not to pay the said assessments, and to resist and prevent the collection thereof; and that the said board has declined to take any steps in the matter.

The bill further states, that these assessments are illegal and void, by reason of a contract between the corporation and the State of Illinois, ascertaining and limiting the liability of the corporation in such manner as to exclude the assessments in question; and that they are void for other reasons, which will appear on an examination of the laws of the State, under color of which they were laid.

The bill makes parties the city of Chicago, the collector of taxes, and the directors of the corporation, who refused to do what was needful to protect it against these illegal demands; and it prays for an injunction against the collection of these assessments.

The bill was taken for confessed as against the directors of the corporation.

The city and the collector demurred to the bill.

Upon the hearing, there was a decree for the complainant, and the city appealed.

I shall confine my argument mainly to the existence and effect of the alleged contract, and the remedy to which the complainant is entitled. The other points have been fully discussed by Mr. Gondy.

I.

There was *some* legal contract between the North Chicago City Railway Company and the State of Illinois respecting the burdens to be borne by the railway company, in consequence of and connected with its use of the streets in which its rails were to be laid.

This admits of no doubt.

By the tenth section of the act of February 14, 1859, (Record, fol. 27, 28,) this corporation was created; and all the grants, powers, privileges, immunities, and franchises described and indicated by the previous sections of the act were conferred on and made applicable to this corporation.

By the second section of the act (Record, fol. 23) there was granted to the corporation power to construct and use its tracks in such streets as might be designated for that purpose by the common council of the city, *in such manner, and on such terms and conditions, and with such rights and privileges, as the common council might, by contract with the corporation, prescribe.*

Acting under this authority, the common council of the city (May 23, 1859) passed an ordinance, which, among other things, by its seventh section, defined the obligations and duties of the corporation "as respects the grading, paving,

macadamizing, filling, or planking of the streets," or parts of streets used by the corporation. (Record, fol. 31, 32.)

From the nature of the case this was only a proposal by the common council to the railway corporation. But when this proposal was accepted by the railway corporation, (June 9, 1859,) and the required bond was given, it became a complete and binding contract. (Record, fol. 9.)

And the contract thus made was ratified and confirmed by the legislature by an act of February 6, 1865. (Record, fol. 12.)

II.

This contract covered the entire subject of the obligations of the railway corporation to contribute to the cost of grading, paving, macadamizing, filling, or planking of the streets or parts of streets used by them; and it defined their obligations to be, to keep eight, or in case of a double track, sixteen feet in width of the street, along the line of the railway, in good repair and condition, in accordance with whatever order or regulation *respecting the ordinary repairs thereof* may be passed or adopted by the common council of the said city. This is the plain meaning of the seventh section of the ordinance.

It begins by clearly describing the subject-matters respecting which it is about to define the obligations of the corporation; and it then declares what the obligations of the corporation are in respect to those subject-matters.

It would be difficult to express more clearly the idea, that by performing what is here required, the corporation will discharge its entire obligation in reference to the construction, improvement, and repairs of the streets they use.

It must be remembered that this section contains the terms of a contract; that it derives this character of a contract not merely from an implication of law, drawn from the nature and objects of the transaction, but from the express words of the act of the legislature which conferred on the common council the power under which it passed this ordinance. That was a

power *to contract with the railway corporation concerning the terms and conditions on which streets might be used, and the rights and privileges which should attend their use.*

I repeat, then, that this seventh section of the ordinance contains the terms of a contract. And those terms are to be fairly construed by the rules applicable to the construction of contracts.

Those rules require that the subject matter of the contract should be first ascertained. Here it is described with such clearness as to leave no doubt what it is. That subject-matter is the construction, improvement, and repairs of streets. Next should be observed the purpose which the parties had in view when they made the contract. This purpose could be no other than to define and fix the relations of the corporation to the subject-matter of the contract; and accordingly these relations are defined and fixed with entire precision.

The railway corporation is to do all *ordinary repairs* to defined parts of the streets used by them, according to the orders of the common council. In reference to the subject-matter of the contract, which is the construction, improvement, and repairs of the streets they use, the railway corporation are to do this. To say they are to do more, is to add new terms to the contract. It is true the contract does not in express words declare that no more shall be required. But such a declaration is unnecessary. When any two parties contract concerning a particular subject-matter, and agree that the obligations of one of them shall consist in doing certain described things, manifestly this means that, if those things are done, the entire duty of the party in reference to that subject-matter is performed. And when the common council of the city, acting under the authority of the legislature to contract concerning the terms and conditions on which, and the rights and privileges under which, this corporation might use streets of the city, entered into a contract defining and fixing the burdens to be borne by the corporation in reference to the construction, improvement, and repairs of those streets, it is plain that any charge or expense, having reference directly or indirectly to such construction, improve-

ment, or repairs, not provided for by the contract, is inconsistent with the contract.

The first pavement laid cannot be an "ordinary repair," made "in accordance with whatever order or regulation respecting the ordinary repairs thereof may be passed or adopted by the common council;" and even if it was, the railway company, being required by the terms of the contract to keep in repair *defined parts* of the streets, it would be compelled to lay the pavement in such parts, and could not be assessed for the supposed benefits in common with other property. The remedy provided in case the company failed to make the repairs is to be found in an ordinance of August 20, 1864. (Record, fol. 45, 54.) If the company neglected to make the repairs, after twenty days' notice, the city might make them, and collect the cost thereof by suit at law in any court of competent jurisdiction.

It is true that the contract does not declare that no assessment for improvements shall be laid on the property of the railway company; and it is admitted that the rule of law requires the use of language which shows clearly the purpose of the State to exempt from taxation. In this case the terms of the contract are such as to exclude the idea of liability for any improvement, except for ordinary repairs. "The company shall, as respects the *grading, paving*, macadamizing, filling, or planking of the streets, or parts of streets, upon which they shall construct their railways," keep defined parts in ordinary repair. The assessments described in the bill are made for grading and paving, and are not for ordinary repairs. They are such as to compel the company to contribute to an expense as respects the paving not included in the contract.

It may be proper to refer to some facts outside of the contract to ascertain its true construction.

In 1864, under the authority conferred by the charter of the railway company, the common council entered into another contract with the railway company, (fol. 45, 50,) in which the company was authorized to lay tracks in additional streets, upon the same terms and conditions, and with the same rights and privileges, mentioned in the contract of May 23, 1859,

except as otherwise therein provided. One of the subjects in regard to which new stipulations were made, was that of the *improvement* of the streets. The parties evidently understood that the seventh section of the ordinance of May 23, 1859, did not require the railway company to contribute to such improvements as grading and paving the streets; for by the contract of 1864 the company was required to keep in repair defined parts of the streets named therein, substantially as specified in the ordinance of 1859, and *also to pave* eight or sixteen feet in width whenever any *new* improvement, paving, repairing, planking, or replanking, is ordered by the common council. Failing so to do, the work was to be done by the city, and *the cost* assessed upon the company In this contract, as in the former one, the idea of assessment for supposed benefits is excluded. If the parties understood the ordinance of 1859 to mean what is now claimed by the counsel for appellant, the fifth section of the ordinance of August 20, 1864, would not have been inserted.

Frequent assessments were made for paving some of the streets occupied by the railway company, from 1859 to 1866, from all of which the property of the company was omitted; and during this period the investments of the proprietors were from time to time increased. While the court will not look outside of the contract itself to ascertain the intention of the parties or to determine its meaning, when the language is clear, yet in cases of doubt, resort may be had to the surrounding circumstances, and to the subsequent action of the parties under the contract to remove the doubt. In this case, the bill sets up facts which show that the parties have always construed the contract of May 23, 1859, to exempt the property of the railway from all liability to contribute to the cost of grading and paving, by special assessment or otherwise, and these facts are admitted by the demurrer.

The assessments described in the bill were not made, because of a different construction of the contract; but upon the theory that the seventh section of the ordinance of 1859 *did not contain any contract* binding on the State or city.

It may be proper to refer to the consequences of placing the

construction on the contract now claimed by the counsel for the appellant. It appears from the averments of the amendment to the bill that the value of the property assessed is $75,000; that the company will be compelled to pay by reason of the proposed improvements and assessments $108,676 94; and that, when completed, the property of the company will not be increased in value one dollar. The appellee asks the court to forbear from giving a construction fraught with such grave consequences; one never contemplated by either party, one which will more than confiscate the entire property assessed.

III.

This contract, made by the common council of the city of Chicago, under the express authority of the legislature, and ratified after it was made by an act of the legislature, is valid and binding.

It is clearly within the scope and terms of the authority conferred by the legislature on the city council.

That was an authority to contract concerning the terms and conditions on which, and the rights and privileges under which, the streets might be used. It was in strict pursuance of this authority for the city council to contract that the railway corporation, as a compensation for its use of any street, or part of a street, should assume upon itself the constant burden of keeping designated parts of such street in repair, and that the performance of this duty should be the condition, and the only condition, required of the corporation, so far as respected the construction, improvement, and repairs of those streets.

A novel mode of using streets of the city, believed to be important for the public accommodation, was proposed. It was wholly a local subject; and the legislature, instead of acting on its details, deemed it wisest and best to confer on the local authority power to do so. That power was, among other things, to fix the terms and conditions on which this new use of streets might be permitted. One of the most obvious and prominent subjects for consideration and action was, what should be the obligations of this party, making this new use

of the streets, in reference to their construction, improvement, and repairs. The subject was committed to the common council, with authority to contract in reference to it. Their action has been confirmed, and unless there was some want of power in the legislature to make the contract, it is not perceived how it can be invalid.

The power of the legislature to make or authorize such a contract is understood to be denied. This denial is rested on the second section of the ninth article of the constitution of the State: "The general assembly shall provide for levying a tax by valuation, so that every person shall pay a tax in proportion to the value of his or her property;" and also on the ninth section of the same article, which provides, "The corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

The appellant also claims that the legislature could not make such a contract, because it could not waive the right of eminent domain.

There can be no doubt that these clauses of the constitution of the State have effectually introduced into the taxing power, both of the legislature and of all subordinate bodies, the rule of uniformity, whether such power is derived from the right of the State to impose taxes or from some supposed connection with the right of eminent domain. But there can be as little doubt that a contract to *commute* the burdens of either general or specific taxes or assessments, of the character of those now in question, for some consideration deemed by the legislature adequate, is not a violation of the rule of uniformity.

It has been correctly said by Judge Cooley, in his valuable work on Constitutional Limitations, (page 495:) "In this particular the State constitutions have been very specific; but in providing for equality and uniformity they have done little more than to state in concise language a principle of constitutional law which is inherent in the power to tax."

The decisions of this court in many cases have shown that

this principle of uniformity does not prohibit the legislature from contracting specially with a corporation on the subject of taxation; and in one of the latest cases it is declared, that this is no longer an open question (1 Black's R., 436.)

In the State of Illinois, before this contract was made, it seems to have been settled law that the legislature might make a contract *commuting* the liability to taxation, without violating the principle of uniformity.

Illinois Central Railroad Company *vs.* The County, &c., 17 Illinois R.

Hunsucker *vs.* Wright, 30 *ib.*, 146.

Same *vs.* Howell, *ib.*, 150.

A plainer case than the one under consideration for the exercise of the power of commutation can hardly be imagined. A new enterprise, deemed to promise great benefits to the public, was proposed. To put it in operation required a license to make use of streets of the city in such manner as had not previously been authorized by law, but which, under proper regulations, would be entirely consistent with their ordinary public use. Whatever may now be said of the liability of the railway corporation to taxes or assessments, under the standing laws for the value of this use of the streets, (a question as to which I refer to the learned argument of Mr. Goudy,) it was manifestly a subject of the utmost importance to the projectors of this enterprise, and it was entirely reasonable and proper as respected the public and the owners of property on the streets, to fix the nature and limits of its liability to such taxation, if carried into execution. The relation of such an enterprise to the subject of taxation or assessment for the construction, improvement, and repairs of streets, was wholly different, both in kind and in degree, from those of citizens generally, and from those of the abutters on the streets. The connection of an owner of land abutting on a street with assessments for construction or improvement was limited to the construction or improvement of that street on which his lot abutted. But this corporation was to become connected in a particular way, not with some lots abutting on

particular streets, but with many miles of streets. And it must have been apparent to every one, that if this license to use the streets, which they were seeking, should be granted to them, on such conditions as would subject them to assessments made under general laws throughout their whole route, as if they were owners of land abutting on both sides of all the streets through which their rails should be laid, their project was simply impracticable.

When, therefore, a contract was made to commute all liability to taxes and assessments for an obligation to keep perpetually in repair certain designated parts of those streets used by them, it was an exercise of the power of commutation relevant to the subject-matter, and within the strictest limits of legislative power.

It has been supposed that the supreme court of the State of Illinois has decided (in the City of Chicago *vs.* Baer) that such a contract is not warranted by the constitution of the State. I do not so understand that decision.

In that case an assessment had been laid by the commissioners on the real estate deemed by them to be benefited for the cost of curbing and paving North Clark street. In making this assessment the rights and interests of this railway company in that street were excluded; it was made as if the railway company had no property there. If property of the railway company existed there, which formed part of the property benefited, and was of such a nature as to come within the scope of the betterment law, then it was obvious that an assessment excluding it did injustice to other owners, and so was void. And this would be equally true whether the property of the railway company had or had not been lawfully exempted from payment of any assessment. The betterment law of 1865 required the cost of such an improvement to be assessed by the board of public works "upon the real estate by them deemed benefited by such improvement, in proportion, as nearly as may be, to the benefit resulting thereto." If the railway corporation had real estate benefited by the improvement, it would not be in conformity with this law to require owners of other real estate to bear and pay that part

of the benefit conferred on the real estate of the railway corporation. The exemption from assessment of its real estate, if it had any which was benefited, could lawfully neither increase nor diminish those proportions of the whole sum which were to be assessed on the other proprietors. Suppose the State had owned all the land on one side of the street, and that consequently this land could not be required to pay any assessment. This would not have enabled the board to impose the entire cost on the owners of the other side of the street. Their duty is to impose the entire cost on *all* the real estate benefited, and apportion it justly in proportion to the benefit received. Whether, when apportioned, any particular piece of real estate must pay the amount assessed on it, or is by law exempt therefrom, in no way affects the assessment itself.

Now, the case with which the supreme court of Illinois had to deal was one where the validity of the assessment was drawn in question; but not one where the *validity of the exemption of particular real estate from the payment of an amount assessed on it under a contract with the State* was drawn in question. It is true this exemption of the railway company from legal liability to pay an assessment by force of a contract was asserted; *but the court declined to decide* whether the ordinance relied on, as showing the terms of the contract alleged to have been proffered by the city and accepted by the railway corporation, *had any legal existence;* and they disposed of the case upon the ground that the railway corporation held property assessable under the law which had not been assessed. This, as I understand it, is the ground of their decision. Certainly they refused to decide whether there was such a contract, and treated that as a question not material to their decision; and it *was* immaterial in the view they took of the case. There is a dictum of the judge touching this question. But the question was not argued, and I apprehend cannot be considered to have been decided. (See Carroll *vs.* Carroll, 16 How., 275.) But if this were otherwise, it would be clear, under the decisions of the court, that if the constitution of the State, up to the time when the contract in question was made, had been so interpreted by the supreme court of the

State as not to restrain the legislature from making such a contract, a subsequent decision cannot affect the validity of the contract.

Gilpecke *vs.* Dubuque, 1 Wallace R., and cases there cited.

The counsel for the appellant claims that the assessments levied were valid. If I understand the counsel, he relies on two propositions: First. These assessments are not imposed by virtue of the power of taxation, but under the right of eminent domain, and therefore the right to make them cannot be waived by the legislature; second, the supreme court of Illinois has decided that the seventh section of the ordinance of May 23, 1859, is void for the want of power in the legislature to make it, and that such decision is conclusive on this court.

The case of Chicago *vs.* Larned, (34 Ill., 203,) cited by the counsel, does not decide that special assessments for the improvement of a street are not taxes; on the contrary, the court applies the rule of equity and uniformity prescribed by the constitution in relation to taxation to such assessments. They are regarded as local taxes. (34 Ill., 279, *et seq.*)

It is true that a discrimination is made by the court between these assessments and taxes levied for the ordinary purposes of government of the State, or of a municipal corporation. In that sense they were not taxes.

The right to make such assessments is referred to the right of eminent domain rather than to the power of taxation, but this is in theory only. For practical purposes the assessments are treated as taxes. If the provisions of the State constitution in reference to taxation are to be applied to such assessments for one purpose, it is difficult to see why they should not for another.

It is true, that a grant of a franchise or land by the Government will not be construed to prevent a condemnation for the use of the public, as for a street or railway, and in that sense the right of eminent domain cannot be waived. Such a principle has no application to the commutation of the right

to make special assessments, in the nature of a local tax, for the improvement of a street.

It is said that the money required to be paid is measured by the benefit received, and, therefore, there is nothing to commute. It is certainly competent for the State to agree with a corporation of this kind, that the benefits may be enjoyed without payment of an assessment, provided satisfactory equivalent burdens shall be borne.

In this case the effect of the contract is to require the railway company to keep in repair defined parts of the streets, regardless of the particular benefits received therefrom by the company, and to permit it o enjoy the benefits to flow from a new pavement without assessment.

The counsel for the appellant seems to think that the owners of other property will necessarily be compelled to pay a larger sum, if the contract of exemption is enforced. This is a mistake. The benefits must be apportioned, whether the railway company is excused or not. The sum assessed on the property of the company will not be paid by the owners of other property, but from the city treasury, and will fall on all tax payers. This distinctly appears by reference to 34 Ill., 280, top page, 282, and an amendment to the city charter of Chicago, passed March 9, 1867, chap. 2, § 14.

The *second* proposition of the counsel for the appellant is not tenable. It is clear that, if the supreme court of Illinois did decide that the seventh section of the ordinance of 1859 was invalid, it was an error. It appears from the record that the question of the right of the State to commute such assessments was not mooted or considered. The counsel rested the case on other grounds. A decision under such circumstances can scarcely be held to be conclusive, even in the State courts of Illinois. However that may be, it does not bind this court. While it is true that the construction given to a State constitution or a State statute is usually followed by this court, yet this rule has no application where the question arises upon a contract which is alleged to be violated by State authority. This court cannot enforce the provision of the Constitution of the United States, that a State shall not make any law im-

pairing the obligation of a contract, without deciding for itself both as to the validity and construction of the contract.

I repeat, that at the time this contract was made it was valid under the decisions in Illinois, and no subsequent construction of the Constitution of the State can affect it. Under the circumstances in this case it is not to be supposed that any such decision has been or will be made.

I observe that the bill in this case appears to be framed on the supposition that it is necessary to show *some law of the State* impairing the obligation of this contract. If this case had come here by a writ of error to a State court, under the twenty-fifth section of the judiciary act of 1789, this *might* be so. But this suit was instituted in a circuit court, and is brought here by appeal. That appeal is to be decided according to the equitable rights of its parties. If there was a contract between the State and the railway corporation which exempted the latter from the payment of the assessments now in question, and that contract was valid, it is wholly immaterial whether any law of the State, or any decision of its courts construing any law, is inconsistent with the contract. It is enough for this end that the demand of payment of the assessments in question is a violation of the rights created and protected by the contract.

IV.

The demand of payment of assessments now in question violates the rights created and protected by the contract between the State and the railway corporation.

This point will require but a brief statement in its support. The contract, as above explained, covers the entire liability of the railway corporation for all payments on account of "the grading, paving, macadamizing, filling, or planking" of the streets in question.

Without here detailing the particulars of these assessments, which are stated in the bill, (Record, fol. 16–19,) it is certain that each of them is inconsistent with the contract, and that the railway corporation cannot be required to pay the same without disregarding its provisions.

V.

The complainant is entitled to the remedy sought by his bill. Dodge *vs.* Woolsey (18 How., 331) is directly in point.

But it has been suggested, that this complainant, as an individual stockholder of the corporation, could, under the statute laws of the State of Illinois, have had some other remedy. The courts of Illinois have never so decided. I am not able to perceive how one corporator can intervene in the statute proceedings concerning taxation, and assert the rights of the corporation in respect to its property and obtain a decision thereon. The relations of corporators to the property and rights of the corporation is fully and ably discussed by Shaw, C. J., in Smith *vs.* Hurd, (12 Met. Rep., 375;) and as there held, a corporator can have no *such* right. The affairs of a corporation are to be managed by a board of directors. A stockholder cannot interfere, because it would violate the fundamental law of all corporate bodies.

But I conceive this inquiry is unimportant in this case.

It is the settled law of this court that the provisions of the sixteenth section of the judiciary act of 1789, which prohibits suits in equity where there is a plain, adequate, and complete remedy at law, is merely declaratory, making no alteration in the rules as to equitable jurisdiction, (3 Peters, 210;) that the question is not whether there was a remedy at law, given by a *statute of a State*, but whether there was a plain, adequate, and complete remedy *at the common law*, (3 Whea., 212;) that the equity jurisdiction of the courts of the United States is the same in all the States, and is wholly unaffected by their statutes, (13 How., 268, and cases there cited;) and, finally, that to bar a suit in equity, the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration as the remedy in equity. (3 Peters, 210.)

I have not attempted to argue the question whether, under the laws of Illinois, the license to the railway corporation to use the streets is assessable real estate, independent of any contract for its exemption. The learned argument of my associate, Mr. Goudy, has covered that question. I desire only to make one

suggestion concerning it. I understand it to be admitted on all hands that this tax is laid, not on the owner of the real estate personally, but on the property interest, whatever it may be, which is benefited; and, consequently, that this tax is to be collected, if not voluntarily paid, by a sale of that property interest on which it is laid. That property interest of the railway corporation is supposed to be its franchise to make a special use of certain streets. I would respectfully inquire whether this franchise to make this use of one particular street was designed by the laws of Illinois to be sold and conveyed to a purchaser to be held and exercised by him; and if so, where are the provisions of the statute laws under which such property can be sold and enjoyed after the sale? Certainly it will not be pretended that under an assessment for improving some one street the franchise of the railway corporation to use other streets can be assessed and sold, any more than land of A, on a street not improved, can be assessed and sold for the improvement of a street on which A owned other land. So that, if it is asserted that the franchise of the railway corporation to use a particular street is real estate which may be sold to pay the assessment for improving that street, there must be a sale of something which is absolutely incapable of use by a third person, and which the laws have made no provision for the transfer or enjoyment of; and it would seem to be clear, beyond all doubt, on looking into the legislation on this subject, not only that the legislature never contemplated any such severance into parts of this franchise, but that the entire scheme of legislation absolutely requires that this corporation, under its contract and bond to the city, and the regulations and securities made and obtained thereby, *and this corporation alone*, should be capable of exercising and enjoying the whole and every part of the franchise to use the street, and that no third person could come in as a purchaser of the whole, *a fortiori*, of a fraction or fractions of that franchise. That which was granted was an interest not alienable either in part or in whole, and consequently it was an interest in land which the legislature intended should not be assessed and sold for non-payment of the assessment.

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